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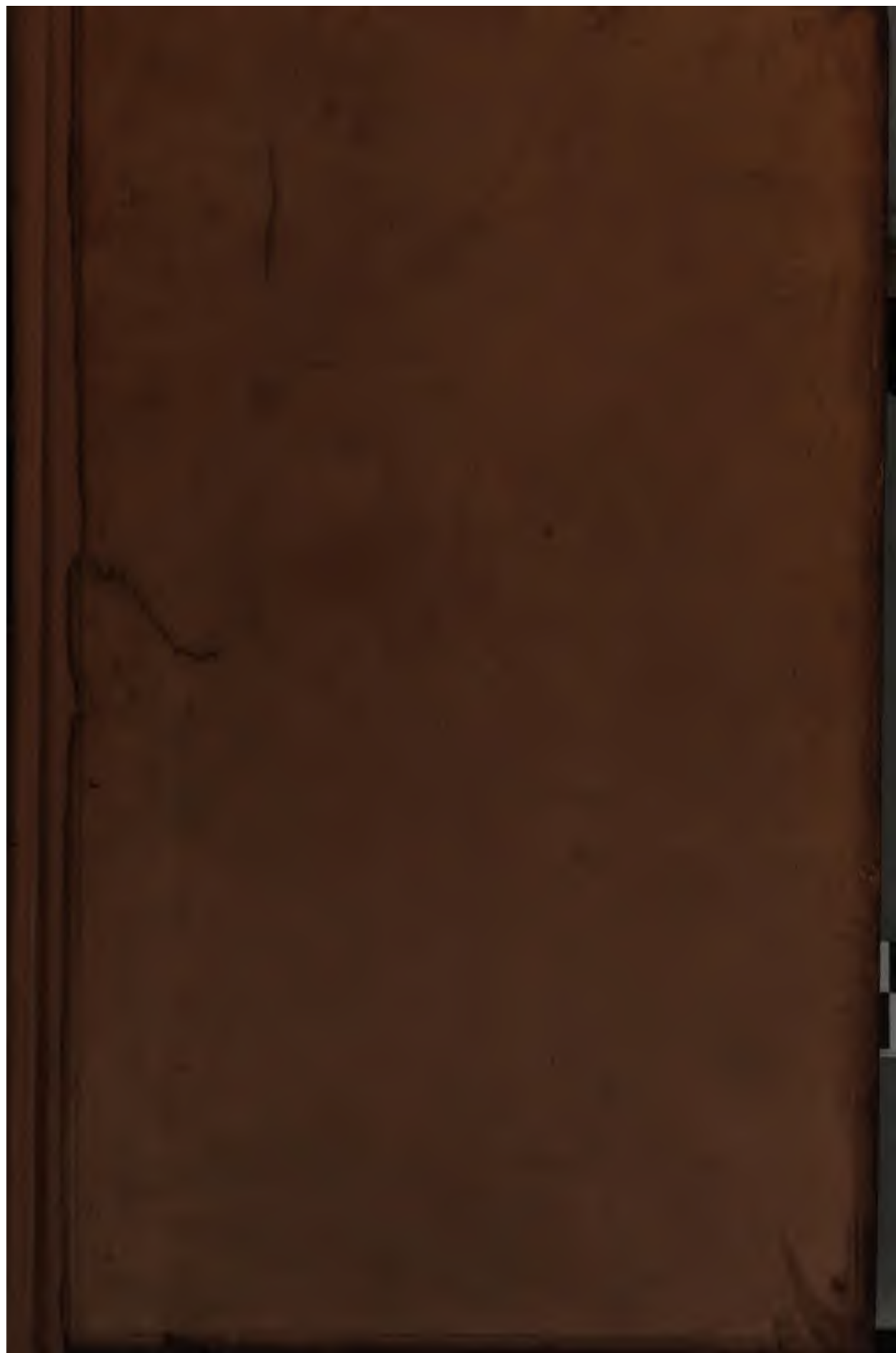
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R E P O R T S

OF

C A S E S

DECIDED IN THE

HIGH COURT OF CHANCERY,

BY

THE RIGHT HON. SIR ANTHONY HART,

AND

THE RIGHT HON. SIR LAUNCELOT SHADWELL,

VICE-CHANCELLORS OF ENGLAND.

By NICHOLAS SIMONS,

Of Lincoln's Inn, Esq. Barrister at Law.

VOL. II.

1827, 1828 & 1829.



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Lord LYNDHURST - - - Lord Chancellor.

Sir J. LEACH - - - Master of the Rolls.

Sir A. HART - - - } - Vice-Chancellors.
Sir L. SHADWELL - } -

Sir J. SCARLETT - - } - Attorneys-General.
Sir C. WETHERELL - } -

Sir N. C. TINDAL - - - Solicitor-General.

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CASES IN CHANCERY

BEFORE THE

VICE-CHANCELLOR.

ANSTRUTHER v. CHALMER (a).

THE object of this Suit was to have it declared that a Disposition or Will of Personalty, made in the Scotch form, by Miss *Catherine Anstruther*, was to be construed according to the Law of *Scotland*.

Miss *Anstruther* was a native of *Scotland*. In 1801 she came to reside in *England*, and was domiciled in *London* up to the time of her death. She was, however, in the habit of going occasionally to visit *Scotland*. During her stay in *Edinburgh* in the year 1814, on one of those visits, she employed a Writer to the Signet in *Edinburgh* to prepare the Instrument in question. It was dated the 16th of December 1814, and was entirely in the Scotch form, and began as follows :

“ I, Miss *Catherine Anstruther*, Daughter of Sir *Robert Anstruther*, of *Balcaskie*, Baronet, for the love

1825:
8th February.

1826:
6th February.

Domicil.
Construction.

A native of Scotland domiciled in England, having Personal Property only, executed, during a visit to Scotland, and deposited there, a Will prepared in the Scotch form, and died in England: held that the Will was to be construed according to the English Law.

(a) The Editor is indebted to his friend Mr. Stuart for the Report of this Case.

1825.

ANSTRUTHER
v.
CHALMER.

and affection I have and bear to Sir *Alexander Anstruther*, of *Caplie*, Recorder of *Bombay*, my Brother, and for other good causes and considerations me moving, do hereby, with and under the Burdens, Declarations and Reversions after specified, give, grant, alienate, assign and dispose to and in favour of the said Sir *Alexander Anstruther*, and *his Heirs* whomsoever, and Assignees, heritably and irredeemably, all and sundry Lands, Tenements, annual Rents and other Heritages, and all heritable and moveable Means and Estate, of whatever nature or denomination, and wheresoever situated." The Instrument then went on, at considerable length, to state that all her Bonds, Securities for Money, Rights of Action, &c. were thereby conveyed; and, after containing, in the usual form of such a Clause in a Scotch Deed, an Obligation to infest Sir *Alexander Anstruther*, and *his foresaids*, in all her Lands and Heritages, and Power to him to call and pursue for, uplift, receive and discharge or assign the Debts, Goods and Effects thereby disposed and conveyed, it appointed him sole Executor in the following manner:

" And I hereby nominate and appoint the said Sir *Alexander Anstruther* to be my sole Executor and Intromitter, with my Moveable Estate, hereby excluding and debarring all others my nearest in Kin from the said Office." Then followed a Clause reserving a Power of Revocation of this Instrument, and consenting to its registration in the Books of Council and Session, and appointing Procurators for that purpose.

As soon as Miss *Anstruther* had executed this Instrument she deposited it in the hands of the Writer to the

CASES IN CHANCERY.

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Signet by whom it had been prepared. Some time afterwards she returned to *England*, and continued, as previously, to visit *Scotland* occasionally. In September 1820 she died at her House in *London*. She never altered or revoked the Instrument in question, and it remained in the hands of the Writer to the Signet till after her death. She left no Real Estate.

1825.

ANSTRUTHER
v.
CHALMER.

Sir *Alexander Anstruther*, the Executor and Legatee, had died in 1818, having made his Will, and thereby appointed the Plaintiff in this Suit his Executrix.

In March 1821, Letters of Administration of the Estate of Miss *Anstruther* were granted by the Ecclesiastical Court to *James Chalmer* and *Alexander Fraser*, as the Attornies of *Elizabeth Campbell*, the Sister and only next of Kin of Miss *Anstruther*.

This Bill was filed by the Executrix of Sir *Alexander Anstruther* against Mr. *Chalmer*, Mr. *Fraser* and Mrs. *Campbell*, charging that, according to the Law of *Scotland*, the Disposition to Sir *Alexander Anstruther* in the Instrument executed by Miss *Anstruther*, was an absolute Disposition, and did not lapse by his death in the lifetime of Miss *Anstruther*, but subsisted for the benefit of his Child or Children ; inasmuch as the Instrument was intended to take effect according to the Law of *Scotland*, and ought to be construed according to the Law of that Country.

It was admitted that Miss *Anstruther* was domiciled in *England* at the time of her death ; and that, according to the Law of *Scotland* (if the Instrument were to be construed by that Law) the Bequest to Sir *Alexander*

1825.

ANSTRUTHER

v.

CHALMER.

Anstruther, in the form contained in the Deed, would not lapse by his death in Miss *Anstruther's* lifetime.

Mr. *Solicitor-General* and Mr. *Oliphant*, for the Plaintiff:—

This question is, whether a Will, being made in *Scotland* according to the Scotch form, and deposited there, shows sufficiently that it was the intention of the Party that, as to Personal Property, the rules of construction of the Scotch Law should govern the Instrument. If there had been a Memorandum indorsed on a Will so made and deposited, declaring that it was the intention of the Party that the Instrument should take effect as a Scotch Will, and be construed according to the Law of Scotland, there can be no doubt that this Court would give effect to it accordingly, and would consider, in the present Case, the Gift to Sir *Alexander Anstruther* as if it were expressed as a Gift to him, and, if he died in the Testatrix's lifetime, then to his Heirs. It must be admitted that the *forum domicilii* is to prevail, as to the distribution of Personal Property, in the case of Testacy as well as of Intestacy; but it ought not to prevail where the intention of the Party is manifested that the construction of the Instrument should be governed by the Law of the Country in which it is executed, deposited and recorded. In *Vattel*, lib. 2, c. 8, p. 175, it is said, in discussing the right of a Foreigner to make a Will: "As to the form or solemnities appointed to settle the validity of a Will, it appears that the Testator ought to observe those that are established in the Country where he makes it, unless it be otherwise ordained by the Law of the State of which he is a member;" and he then adds: "I speak here of a Will which is to be opened in the place where a Person dies."

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Mr. Hart, Mr. Knight, and Mr. Stuart, for the Defendants:—

1825.

ANSTRUTHER
v.
CHALMER.

It is not necessary to argue what the construction ought to be if this were the case of a Contract, instead of a Testamentary Instrument; for the Law of the Country in which the Testator was domiciled at his death, must, as to Personal Property, govern the construction of a Testamentary Instrument. And, in the present Case, the Ecclesiastical Court is the proper place to try this question, for the grant of Administration to the next of Kin has decided this Case. The Letters of Administration express that they were granted to *Fraser and Chalmer* "for the use and benefit of *Elizabeth Campbell*."

The *Vice-Chancellor* then directed the Cause to stand over, that it might be ascertained whether the question had not been decided by the Ecclesiastical Court, and by the form of the Letters of Administration.

This day a Certificate from the Deputy Register of the Prerogative Court was read to the Court, which stated, in substance, that the words used in the grant of Letters of Administration, were those invariably used where the Grant was to Persons under a Power of Attorney from the Party entitled to the representation; and that the words: "for the use and benefit" of that Person, did not exclude the claim of other Persons to share in the Personal Estate.

1826:
6th February.

The *Solicitor General* and Mr. *Oliphant*, for the Plaintiff:—

This is entirely a Scotch Instrument, and contains technical phrases wholly unintelligible, unless the Scotch

1826.
 ANSTRUTHER
 v.
 CHALMER.

Law is applied to it. In Lord *Kames's* Elucidations of the Statute and Common Law of *Scotland* (b), Lord *Hardwicke*, in a Letter to Lord *Kames*, stating the reasons why in the Case of *Gordon Park*, a substitution in a Scotch Tailzie was put on the same footing as an English Remainder, lays down principles which are quite applicable to the present Case. There can be no doubt that words might have been used as to the Gift to Sir *Alexander Anstruther*, which, even according to the Law of *England*, would have made it good to his Representatives, and have prevented a lapse.

Mr. *Hart*, Mr. *Knight*, and Mr. *Stuart*, for the Defendants, insisted that, as the question related to Personal Property, and the Testatrix was domiciled in *England*, there was not enough to prevent the Court from construing the Will according to the Law of *England*.

The VICE-CHANCELLOR (c):—

In this Case, Miss *Anstruther*, who was born in *Scotland* but was domiciled in *England*, being on a visit in *Scotland*, caused her Will to be prepared there by a Writer to the Signet, who made it in the Scotch form, so as to give an absolute Interest in all her Real and Personal Estate to Sir *Alex. Anstruther*, who afterwards died in her lifetime. This Will, after the death of Miss *Anstruther*, was proved in *England*. Miss *Anstruther* at her death had no Real Estate; and, it being admitted that, by the law of *Scotland*, the Gift to Sir *Alex. Anstruther* was not lapsed by his death in the lifetime of Miss *Anstruther*, the question in this Cause is,

(b) P. 386.

(c) Sir John Leach.

CASES IN CHANCERY.

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whether Miss *Anstruther's* Personal Property would, under this Instrument, belong to the Representative of Sir *Alex. Anstruther*, or to the next of Kin of Miss *Anstruther*, as in the case of a failure by lapse.

1826.

ANSTRUTHER
v.
CHALMER.

By the Law of England, where an absolute Interest in Personal Property is given by a Testamentary Instrument, there the Gift fails if the Donee die in the lifetime of the Testator; and Miss *Anstruther* being domiciled in this Country, the Law of *England* must prevail in this Case. The next of Kin are therefore entitled.

Bill dismissed.

FREE v. HINDE.

1827:
16th June.

Post Obit.
Receiver.

THE Defendant was Tenant in Tail Male, in remainder expectant upon the decease of his Brother *John Jacob Hinde* without Issue Male, of certain Real Estates in *Essex*, and also of Estates directed to be purchased with 12,349*l.* 15*s.* three per cent. Reduced Annuities, 1,948*l.* 8*s.* 8*d.* Bank Stock, 1,568*l.* 12*s.* 8*d.* three per cent. Consols, and some other smaller sums of Stock. *John Jacob Hinde* had been an Idiot from his birth, and a Commission of Lunacy was in force against him. By

Where a Tenant in Tail in remainder had agreed to pay a sum of Money after the death and failure of Issue of his Brother, the Tenant in Tail in possession, and had secured

the Money by a Mortgage of the Estate, and covenanted to levy a Fine and suffer a Recovery to give effect to the Mortgage, but on coming into possession of the Estate refused to perform his Covenant, the Court appointed a Receiver of the Rents.

1827.

FREE

v.

HINDE.

Indentures dated the 4th and 5th of *May* 1808, in consideration of 3,000 *l.* paid by the Plaintiff to the Defendant, the latter covenanted that, in case *John Jacob Hinde* should die, in his lifetime, without Issue Male, he would, within six Months afterwards, pay 10,000 *l.* to the Plaintiff; and he conveyed a Moiety of the *Essex* Estates (subject to his Brother's Estate in tail male therein) to the Plaintiff in fee, and covenanted to levy a fine *sur conuzance de droit come ceo*, &c. thereof, before the end of the then present Term, to the use of the Plaintiff in fee, and also, within six Months after the death of his Brother without Issue Male, to procure an Order of the Court of Chancery, and to do all other necessary acts for vesting in and assigning to the Plaintiff a moiety of the sums of Stock before mentioned. And it was declared that the Plaintiff should stand seised and possessed of the moiety of the Estates and sums of Stock, upon trust, in case *J. J. Hinde* should die in the Defendant's lifetime, without Issue Male, and default should be made in payment of the 10,000 *l.*, to raise that sum by Sale or Mortgage: and the Defendant further covenanted that, in the event of his Brother's death as before mentioned, he would, within six Months afterwards, suffer a Recovery of the moiety of the *Essex* Estates, for the purpose of vesting the fee in the Plaintiff, upon the Trusts aforesaid.

John Jacob Hinde died in September 1826, without Issue. The Defendant not having done any of the acts he had covenanted to perform, the Plaintiff filed a Bill against him, praying for a specific performance of the Covenants, and to have a moiety of the sums of Stock, and of the Dividends accrued thereon since the death of *J. J. Hinde*, transferred and paid into Court;

for a Receiver of the Rents of a moiety of the *Essex* Estates; and for an Injunction to restrain the Defendant from mortgaging or disposing of any of the Property included in the Security, or receiving the Income thereof.

1827.

FREE
v.
HINDE.

The Defendant, in his Answer, stated that, at the time when the 3,000 *l.* was paid to him, he was (as the Plaintiff knew) in embarrassed circumstances: that he and his Brother were then of the respective ages of thirty-nine and fifty-two years: that the Plaintiff also knew that *J. J. Hinde* had been an Idiot from his birth, and that there was not any chance of his recovering his faculties, or having lawful Issue: that, according to the respective ages of himself and his Brother at the time when the Money was advanced, the value of a sum of 10,000 *l.* to be paid by the Defendant in case he should survive his lunatic Brother, was much more than 3,000 *l.*: that, in Easter Term 1824, he and his Son *Jacob William Hinde* had levied a Fine of the *Essex* Estates to *T. Metcalfe*, the uses of which were declared to be for securing to that gentleman the payment of 20,500 *l.*: and that the Defendant had filed a Bill against the Plaintiff for the purpose of setting aside the Deeds of May 1808, upon repayment of the 3,000 *l.*, with Interest at 4 *l.* per cent. from the time it was advanced; and he submitted that the Plaintiff ought not to be permitted to avail himself of his Security, but ought to deliver it up to be cancelled, upon payment of the 3,000 *l.* and Interest.

Mr. *Sugden* and Mr. *Girdlestone*, for the Plaintiff:—

It is nearly twenty years since the Plaintiff lent his Money, with the chance of losing the whole of it. As

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v.
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the Defendant refuses to perform his Covenant to levy a Fine, the Plaintiff's Security is no better than a Life Estate. If the Court were to permit the Defendant, under these circumstances, to continue to receive the Rents of the Estate, what security could it give the defendant that, at the hearing of the Cause, he should not be a loser? It is no answer to the Lender to tell him that the mere payment of Money into Court is all that he can have, whilst the Borrower is to be allowed to receive the Profits of the Estate, to enable him to carry on the Contest and protract the ultimate Decision.

Mr. *Heald* and Mr. *Koe*, for the Defendant, referred to *Curling v. Marquis Townshend* (a), and *Marsack v. Reeves* (b); and contended that, as the Defendant was ready to pay the principal Money and Interest into Court, a Receiver ought not to be appointed.

Mr. *Sugden*, in reply:—

The Equity administered in cases of this sort has been carried infinitely too far. *Marsack v. Reeves* was an extreme Case; one which the Counsel for the Defendant always felt they could not support, the inadequacy being so great. But it is yet uncertain what may be the result of that Case at the Hearing.

The VICE-CHANCELLOR (c):—

It is only reasonable, under the jurisdiction which is exercised in these Cases, that, upon payment into Court of the Money actually advanced, together with Interest, the Court should interfere, provided it can

(a) 19 Ves. 628.

(b) 6 Madd. 108.

(c) *Ex relatione.*

see that the interposition will not be of any ultimate injury to the Lender.

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v.
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I think I perfectly well understand the Order made by Lord *Eldon* in the Case of *Curling v. Marquis Townshend*. It was there admitted that Lord *Townshend's* Title to the Estate was absolute, and that the Judgment of the Plaintiff was a Charge on the *corpus* of the Estate; so that the Plaintiff would be secure in the event of a Decree in his favour. In this Case, however, it is far otherwise. The whole Security now possessed by the Party making this Motion, is contingent on the Life of the Borrower of the Money. A Contract has been entered into for making the Security effectual by letting in the Incumbrance, which now extends only to a Life Estate, upon the Reversion. If this had been done, the Lender would have had security for the larger amount, in case of its being found to be ultimately due. That would be consistent with the principle of the Court, which places the Funds in a state of security pending litigation.

It would be the height of injustice, after near twenty years, during which the Plaintiff has confided in the engagement of Major *Hinde* to give him an indefeasible Interest in the Estate for the security of the Contract, now to allow him to enjoy the Estate upon a mere deposit of the Sum originally borrowed, with the Interest. If he should come into Court and say: "I have done all I contracted to do," it would be pretty much of course to grant him this indulgence. He may probably prefer to secure the Estate to his Children, by refusing to cut off the Entail, as other men

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have done. I shall not look to his motives; but the Plaintiff must, at all events, be secured.

Supposing the Money were to be tendered under such circumstances, it would be a question whether payment into Court would be the proper course to satisfy the justice of the Case, or whether the payment should not be made, at once, to the Party himself.

It is impossible wholly to reconcile oneself to the doctrine of Courts of Equity in oversetting these Contracts, in the extent to which it has been carried. I never could reconcile myself to a case where the Court gives eventually the mere Sum advanced, with Simple Interest, whilst the Accumulation at Compound Interest, would probably double the Sum.

Motion granted.

20th July.

HULME v. COLES.

Surety.

A Surety is not discharged by the Creditor taking from the Debtor a *Cognovit* in an Action he had brought against the Debtor, with a stay of Execution until a day earlier than that on which Judgment could have been obtained in the regular course.

A MOTION was made, in this Cause, for an Injunction to restrain the Defendant, the Administrator of *Catherine Coles*, deceased, from proceeding in an Action which he had commenced against the Plaintiff for recovering Money due on a Bond given to the deceased, in which the Plaintiff had joined, as Surety, with one *Burckhardt*. The facts admitted by the Answer, and relied upon in support of the Motion, were that, in June 1817, *Catherine Coles* had commenced an Action upon the Bond against *Burckhardt*, and, on

been obtained in the regular course.

the 23d of that month, without the Plaintiff's privity, took a *Cognovit* from him for the amount of the Debt, with a stipulation that no Judgment should be entered up or execution issued until the 1st of August following. The Plaintiff insisted that this proceeding was a giving of time to the Principal, which discharged him, the Surety, from all liability under the Bond.

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HULME
v.
COLES.

Mr. *Shadwell* and Mr. *Whitmarsh*, in support of the Motion, said that, as by the stipulation in the *Cognovit* execution was stayed, it was a clear case of giving time; and that, therefore, the Surety was discharged: and they cited *Rees v. Berrington* (a).

Mr. *Sugden* and Mr. *Campbell*, for the Defendant:—

A Surety is never discharged by the delay of the Creditor in suing the principal Debtor, unless the Creditor makes an Agreement with the Principal by which he is prevented from suing him. In this Case the Creditor's remedy against the Principal was never lost, nor were his hands tied for a moment: by the arrangement, the remedies of the Surety were not diminished or affected in any manner. It is clear that, in the usual course, Judgment could not have been obtained in the Action until long after the 1st of August, and therefore the period for getting the benefit of the Action has been shortened, and not extended. *Prendergast v. Devey* (b); *Samuell v. Howarth* (c); *Davey v. Prendergrass* (d); *Boulton v. Stubbs* (e).

(a) 2 Ves. J. 540.

(d) 5 B. & A. 187.

(b) 6 Madd. 124.

(e) 18 Ves. 20, see 26.

(c) 3 Mer. 272, see 278.

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The VICE-CHANCELLOR :

The principle of discharging a Surety by the giving of time by the Creditor, is a refinement of a Court of Equity; and I will not refine upon it. By the arrangement complained of, time was not given, but the remedy was accelerated.

Motion refused.

28th July.

GRANT v. GRANT.

Practice.
Amendment.

Motion for
leave to amend,
without preju-
dice to a *Ne*
exeat, refused.

MOTION to amend the Bill, without prejudice to the writ of *Ne exeat* which had issued in the Cause, on payment of 20s. Costs. The Amendments were stated in the Affidavit in support of the Motion, and the Bail had been served with notice, in compliance with a direction given by The *Vice-Chancellor*, when the Motion was mentioned to him on a preceding day.

Mr. *Shadwell* and Mr. *M^r Arthur*, for the Plaintiff:—

The proposed Amendments do not tend to vary or withdraw any of the Statements in the Bill, but only to put the Case in a more perfect form upon the Record. Courts of Law permit Declarations to be amended after plea pleaded, and even after verdict, without paying any regard to the Bail. Where a writ of *Ne exeat* issues, the Sheriff is not bound to take any bail at all; *Boehm v. Wood* (a); but the Bail, when taken, are never discharged without a special application.

(a) 1 Turn. & Russ. 332.

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[The *Vice-Chancellor* : The Plaintiff is entitled to amend as a matter of course.]

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v.

GRANT.

As no Order could be found to show the practice of the Court on applications similar to the present one, it was thought best not to obtain the Order as a matter of course, but to bring the point before the consideration of the Court. Bills are allowed to be amended without prejudice to Injunctions. *Sharp v. Ashton* (b); *Pratt v. Archer* (c).

The other Cases referred to were *Raynes v. Wyse* (d), *Pannell v. Taylor* (e), and *Ray v. Fenwick* (f).

Mr. *Heald* appeared for the Bail, and Mr. *Pemberton* for the Defendants :

But The *Vice-Chancellor*, without hearing them, said that he had an unqualified aversion to the writ of *Ne exeat*, but should abstain from expressing any opinion that might prejudice the question, as he was not required to do it in that stage of the Cause; that he had no authority over the Bail, but that the Plaintiff's Counsel, if they were satisfied with the analogy of the practice at Law, might take an order to amend, without the special reservation, or might abandon their Motion, but that, in either case, they must pay the Costs.

(b) 3 V. & B. 144.

(e) 1 Turn. & Russ. 96.

(c) 1 Sim. & Stu. 433.

(f) 3 Bro. C. C. 25.

(d) 2 Mer. 472.

1827:
28th July.

MACNAB v. MENSAL.

Practice.
Process.

If the Messenger ordered to bring up a Defendant, dies,

the Sergeant-at-Arms will be ordered to go.

A Messenger, who had been ordered to bring up the Defendant upon the Sheriff's return of *Cepi Corpus*, died. The *Vice-Chancellor*, on the motion of Mr. *Simpkinson*, ordered the Serjeant-at-Arms to go.

28th July.

KIRKPATRICK v. MEERS.

Practice.
Attachment.

Where a Defendant, after notice of the Plaintiff's intention to issue an Attachment unless an Order for Time is obtained, procures the Order, but is unable, on account of the press of business, to get it drawn up, and omits to give the Defendant notice of the Order until an Attachment is sealed, he can not set aside the Attachment.

THE time allowed for the Defendant to put in his Answer after appearance, expired on the 7th of June. On the 11th, notice was given to the Defendant's Clerk in Court that an Attachment would be issued against the Defendant, if an Order for time to answer were not obtained. On the 15th, an Order for time was obtained; but (as was stated in the Affidavits filed for the Defendant) it was not drawn up, on account of the press of business, until the 23d. On the 18th, the Plaintiff's Solicitor gave to the Defendant's Solicitor notice of his intention to seal an Attachment. On the next day it was actually sealed, and the Plaintiff's Solicitor then wrote to the Defendant's Solicitor, informing him of his intention to put the writ into the Sheriff's hands. On the 20th, the Plaintiff's Solicitor was told that an Order for time had been obtained; and on the 23d, the Attachment was executed. Mr. *Wakefield*, for the Defendant, now moved to discharge

the Attachment for irregularity. He relied on *Barritt v. Barritt* (a).

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MEERS.

Mr. *Pepys*, for the Plaintiff, said that *Barritt v. Barritt* did not apply, not only as the Defendant had notice of the Plaintiff's intention to issue the Attachment, but as the Plaintiff had no notice that the Order for time had been obtained, until after the Attachment had been sealed: and that it was not executed until fifteen days after the time at which it might have been executed.

The VICE-CHANCELLOR:

In *Barritt v. Barritt*, the Attachments were sealed against good faith; and, upon that principle, the *Lord Chancellor* set them aside. But in this Case there is a total absence of all surprise: therefore refuse the Motion, with Costs.

(a) 3 Swan. 395.

1827 :
30th & 31st
July.

*Will.
Construction.
Tenant for Life
of Residue.*

The Tenant for Life of a Residue, which is directed to be laid out in certain Securities, is entitled to the Income accrued in the first year after the Testator's decease on such parts of the Testator's Estate as are invested, at his death, in the proper Securities, and on such parts as are afterwards so invested within the same year ; but the Income, before such Investment, forms part of the Capital of the Residue.

LA TERRIERE v. BULMER.

SIR *Femoick Bulmer*, deceased, by his Will, dated the 23d of April 1824, after making certain specific Devises and Bequests, and bequeathing an Annuity and several pecuniary Legacies, disposed of his residuary Estate in the following words : " And as to all other my Stocks, Funds and Securities for Money, whether in England or elsewhere, and all the rest, residue and remainder of my Estate and Effects, whatsoever and wheresoever, whether Real or Personal, of or to which I am in any way seised, possessed or entitled, or over which I have any right or power of disposition, or of or to which I, or any person or persons whomsoever in Trust for me, am, is or are seised or possessed or entitled in possession, reversion, remainder or expectancy, and by me not otherwise devised or bequeathed, I give, devise and bequeath the same unto the said *William Bulmer, Isaac Jackman and Charles Smith*, their Heirs, Executors and Administrators respectively, according to the several natures and qualities thereof, upon Trust, with all convenient speed after my decease, to make sale and absolutely dispose of, by public Auction, such parts of my said residuary Estates and Effects as shall consist of Freehold, Copyhold or Leasehold Estates, and such other parts of my said residuary Estates and Effects as, from the nature thereof respectively, cannot otherwise be converted into Money, unto any person or persons, for the best price or prices that can be reasonably gotten for the same :

And upon further Trust to call in, collect and convert into Money all Securities for Money, and all other my residuary Personal Estate and Effects. And I do hereby declare and direct that they, my said Trustees, and the Survivors and Survivor of them, and the Heirs, Executors and Administrators of such Survivor, shall stand possessed of my ready Money, and of the Monies to be produced by the sale, collection and conversion of my said residuary Real and Personal Estates and Effects, subject to the payment of my just Debts, Funeral and Testamentary Expenses, and the several Legacies bequeathed by this my Will, or to be bequeathed by any Codicil or Codicils hereto, upon, with and subject to the several Trusts, Powers and Provisions hereinafter expressed and declared of and concerning the same (that is to say) as to one equal third part thereof, in Trust for the said *Henry Morgan Bulmer*, his Executors, Administrators and Assigns; and, as to the two remaining or other third parts or shares of the Proceeds to arise and be received from the sale and conversion of my said residuary Estates and Effects, and of the Monies to be produced by the sale, collection and conversion thereof, upon Trust to lay out and invest the same two third parts, when and as the same shall come into their hands, in the names or name of the Trustees or Trustee for the time being thereof, in or upon any of the Government or Parliamentary Stocks or Funds of *Great Britain*, or on Real Securities in *England* or *Wales*." The Testator then directed his Trustees to stand possessed of the Stocks, Funds and Securities so to be acquired and purchased as aforesaid, in Trust for Mrs. *La Terriere*, for Life, for her separate use, and after her decease, for her Children, in equal Shares, to be vested Interests in them at the usual periods.

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LA TERRIERE
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BULMER.

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 LA TERRIERE
 v.
 SUMNER.

The Testator died in May 1824. At his decease his Personal Estate consisted of Stock in the Funds, East India Bonds and other Public Securities, Shares in Insurance Offices and Canals, Mortgages, Bonds, &c. Within a year after his decease the Trustees sold his Real Estates, and invested the proceeds in the Funds.

The Bill was filed by the Infant Children of Mr. and Mrs. *La Terriere*, against their Father and Mother, the Executors and Trustees, and certain other parties; and it prayed to have the usual Accounts taken of the Testator's Real and Personal Estates, &c.; that the Trusts of the Will might be carried into execution; and that the Plaintiffs might be declared to be entitled, as Tenants in Remainder of two third parts of the Testator's residuary Estate, to have the whole of the Interest that had arisen therefrom within the first year next after the Testator's death, applied towards the increase and accumulation of their Shares.

The Decree, after directing the usual Accounts to be taken of the Testator's Real and Personal Estates, ordered the *Master* to ascertain and state to the Court: the amount of the Interest or Income accrued due, within the first year next after the Testator's decease, on all such parts of his Real and Personal Estate (not specifically disposed of) as, at the end of such first year, remained unsold, undisposed of, or unconverted by the Defendants, the Executors and Trustees, and also the amount of the Interest or Income accrued due on all such parts of the Real and Personal Estate (not specifically disposed of) as were sold, disposed of or converted within such first year, previous and up to

the time of the sale, disposal or conversion thereof; and also the amount of all Interest or Income accrued due, within such first year, on all Stocks, Funds or Securities, in the purchase whereof the Monies received by the Executors and Trustees, on account of the Real and Personal Estate, had been invested.

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The *Master* having reported as to the several matters referred to him as before stated, and that all the Testator's Funeral Expenses, Debts, Legacies and Annuities had been paid, the Cause came on for further directions.

Mr. *Pepys* and Mr. *Benson*, for the Plaintiffs and the Defendants having the same interest, said that the Testator had directed the proceeds of his Estates to be invested in particular Securities; that several parts of the Estate were not invested as the Testator had directed; and that he had given Mrs. *La Terriere* no Interest except in the Securities which he had directed to be purchased; and that therefore she was not entitled to Interest in respect of any parts of the Estate that were not invested in the proper Funds at the Testator's death; and they relied on *Sitwell v. Bernard* (a), *Taylor v. Hibbert* (b), and *Stott v. Hollingworth* (c).

Mr. *Heald* and Mr. *Koe*, for the Defendant, Mrs. *La Terriere*, said that she was entitled, on the principle of *Angerstein v. Martin* (d) and *Hewitt v. Morris* (e), to the Income arisen during the first year after the Tes-

(a) 6 Ves. 520.

(d) 1 Turn. & Russ. 232.

(b) 1 Jac. & Walk. 308.

(e) Ibid. 241.

(c) 3 Madd. 161.

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tator's death on all his Property; that the reason why the Court gave the Tenant for Life the first year's Income, was that no part of the Property was required for payment of Debts; that, at all events, she was entitled to the first year's Income on what was found invested in the Funds at the Testator's decease, and on what was so invested by the Executors within the first year; and they referred to *Howe v. Lord Dartmouth* (f).

The VICE-CHANCELLOR:—

This is a question of construction upon the words of the Testator's Will. The Tenant for Life can claim no Interest as to the Securities which were not such as the Testator directed for investment. But upon the authority of *Hewitt v. Morris* (which I have always considered to be rightly decided), she is clearly entitled to Interest on all parts of the Estate that were found invested in the proper Securities; and, upon the same principle, it should seem to follow that she is entitled to Interest on subsequent Investments in the right Securities. The Interest on the Mortgages must be apportioned, as the Tenant for Life is entitled only to such part of it as accrued due after the Testator's death.

“ This Court doth declare that the Defendant, *M. A. A. La Terriere*, is, under and by virtue of the last Will and Testament of Sir *F. B.*, the Testator, &c. entitled to the Income accrued due within the first year next after the Testator's death, on two-thirds of all such parts of the Testator's Estate as, at the time

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of his death, existed in a proper state of investment according to the directions of his Will, and also of the Income accrued due, within the first year after the Testator's death, on all Investments according to the direction of his Will, made by and with the Monies arising from the Sale or Conversion of two-thirds of all such parts of the said Testator's Estate as did not exist in such proper state of investment. And this Court doth declare that the Income accrued due, within the first year after the Testator's decease, on two-thirds of such last-mentioned parts of his Estate, previous and up to the respective times of the Sale and Conversion thereof, ought to form part of the Capital of the two-thirds of the Testator's residuary Estate, by the said Testator's Will devised and bequeathed to the Defendant, *M. A. A. La Terriere*, for Life. And this Court doth declare that, according to the aforesaid construction of the said Testator's Will, the said *M. A. A. La Terriere* is entitled to be paid 929*l.* 6*s.* 6*d.*, being two-thirds of the aggregate amount of the Third and Fifth Schedules annexed to the *Master's* Report, after deducting 20*l.* 19*s.* 9*d.* for so much of the Interest on the Mortgage from Mr. *Goodwin*, in the said Third Schedule mentioned, as accrued due in the Testator's lifetime, and 28*l.* 2*s.* 10*d.* for Interest on the Purchase-mones of Lots 7, 9, &c. in the said Fifth Schedule mentioned," &c.

Reg. Lib. B. 1826.

1827:
24th July and
29th October.

Will.

Construction.
Conversion.
Escheat.

Testator gave a Copyhold Estate to Trustees for his Wife, until the Leases to which it was subject expired, and directed that then it should be sold, and the Proceeds be invested for the benefit of his Children; but if his Wife should die before the Leases expired, that it should be immediately sold, and the Proceeds disposed of as before. The Wife survived the Children, but died before the Leases expired. The surviving Trustee, who claimed the Estate for his

own benefit, was decreed to surrender it to the Administrator of the Children, but without prejudice to the Rights of the customary Heirs of either the Testator or the Children, if any such Heirs were in existence.

BURTON v. HODSOLL.

THOMAS LAMBE made his Will, dated the 21st of June 1804, and which was, in part, as follows: " I give and devise unto *John Hodsoll*, of *Carey-street*, *Lincoln's-Inn*, Esquire, and *Joseph Boucock*, of the *Old Bailey*, Stone Mason, and the Survivor of them, or the Executors or Administrators of such Survivor, all those my three Freehold Messuages in *Furnival's-Inn-Court*, *Holborn*, and also all my Stock or Shares in any of the Public Funds, and all Money in hand, or Debts due to me, to be placed in the Three per Cent Consolidated Bank of *England*, whereof I may be possessed of or entitled to, upon this special Trust and Confidence, that they my said Trustees shall and do permit and suffer my Wife, *Maria Dove Lambe*, to receive and take, for and during the term of her natural life, all Rents and Profits of my said Messuages, and all other Freeholds or Leaseholds that I may be possessed of, and the Interest, Dividends and Proceeds of the said Stock or Shares in the Bank of *England*, except the Presents hereinafter mentioned, for the support and maintenance of Herself and all my legitimate Issue which I now have or may hereafter have by her, except as follows; that is to say, that in case my reputed Son, known by the name of *Thomas Lambe*, shall live to attain the age of Twenty-one years, I will and direct that they my said Trustees shall and do, with all convenient

speed, transfer and assign over to him 200 *l.* Stock of the Three per Cent Consols of the Bank of *England*, part of my Stock or Share therein, and to have no other claim on my Property whatever, but to be in full of all bequest from me to him. And I do hereby further will and direct my said Trustees to assign and transfer unto each and every of my lawful Children the *like* sum of 400 *l.* Three per Cent Consols, part of my Stock or Share therein, when and so soon as they shall respectively attain their respective ages of Twenty-one years. And from and after the Decease of my said Wife, and all my Children have attained the age of Twenty-one years, I will and direct that my said Trustees, or the Survivor of them, or the Executors or Administrators of such Survivor, do and shall make an equal division, among and between all my said Children and their Heirs, of my said three Freehold Messuages, either by sale or otherwise, as may be deemed most conducive to the interest of my said Children; and also do and shall, in like manner, transfer over unto my said Children all the remaining part of my Stock and Share in the Three per Cent Consols Bank of *England*, and all Stock or Shares my Property, Estate and Effects, and to divide the same, in equal Shares and Proportions, among and between all my said Children and their Heirs."

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The Testator made a Codicil to his Will, in the words following: "I, *Thomas Lambe*, do hereby will and direct that my Copyhold Estate, situated in *Church-street, Islington*, be transferred to my beloved Wife, *Maria Dove Lambe*, until the expiration of the Leases, and after that time, soon as convenient, or within one

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year, to be sold by public Auction, the Money to be placed in the Three per Cent Bank of *England* Stock, for the benefit of my Children and their Heirs, as directed in the Will. If it should please God to call her before that time of the expiration of the Leases, the Copyhold to be sold by public Auction, soon as convenient, and the Money placed as above directed. *N. B.* If there should not be Money sufficient in my possession at the time of my decease to pay the Fine of the Copyhold, proving the Will, and Funeral Expenses, my Executors to sell, out of the Three per Cent Consols, 600 *l.*, or a small Sum, as may be required."

The Testator died in May 1806, leaving *Maria Dove Lambe* his Widow, and *Joseph Lambe*, his only Son and Heir according to the Custom of the Manor of which the Copyhold Estate was holden, and *Maria Dove Lambe* the younger, and *Harriott Lambe*, his only other Children him surviving; and which *Joseph Lambe*, *Maria Dove Lambe* the younger, and *Harriott Lambe*, were also his sole next of Kin. *Hodsoll* and *Boucock*, the Trustees, were, shortly after the Testator's decease, admitted Tenants of the Copyhold Estate, and entered into the receipt of the Rents and Profits thereof. All the Testator's Children died Infants, intestate and unmarried, at the following times: *Maria Dove Lambe* the younger, in July 1807; *Joseph*, in March 1809; and *Harriott*, in June 1810. In August 1807, the Testator's Widow married the Plaintiff; and in October 1823, she died. After her death the Plaintiff took out separate Letters of Administration to her and her three Children.

The Bill alleged that *Maria Dove Lambe's* Share of the Proceeds of the Sale of the Copyhold Estate became, upon her decease, vested or liable to be vested in her Personal Representative, or distributable between her Brother and Sister; or that, otherwise, it devolved, as being undisposed of by the Will and Codicil, to her Mother, as the Testator's Widow, as to one third Part thereof; and as to another Part thereof, to the legal Personal Representatives of *Maria Dove Lambe* the younger, as one of the Testator's next of Kin; and as to the Residue thereof, to her Brother and Sister, as the other next of Kin of the Testator: that *Joseph's* Share of the Proceeds of the Sale of the Copyhold Estate, and also his Interest in the Estate of his deceased Sister, became, upon his decease, vested or liable to be vested in his Personal Representative; or otherwise the Proceeds of the Sale of the Copyhold Estate became vested in his only surviving Sister, or otherwise his Share or presumptive Share thereof devolved, as being undisposed of by the Will and Codicil, to his Mother, as the Testator's Widow, as to one third Part thereof; and as to another Part thereof, to his Sister, as one of the next of Kin of the Testator; and as to the Residue thereof, to the legal Personal Representative of his deceased Sister and himself, as the two other next of Kin of the Testator: that, upon the decease of *Harriott Lambe*, the Proceeds of the Sale of the Copyhold Estate, and also her Interest in the respective Estates of her deceased Brother and Sister, vested in her legal Personal Representative; or otherwise the Proceeds of the Sale of the Copyhold Estates devolved to her Mother, as undisposed of by the Will and Codicil, and as Widow of the Testator and next of Kin of her Children: that the Plaintiff, as the Administrator

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of his Wife and her three Children, was entitled to the Proceeds of the Sale of the Copyhold Estate, which ought to be considered as having been, by the effect of the Codicil, converted into Personalty : that he was ignorant who was the Customary Heir of the Testator or his Children. The Bill prayed that the Will and Codicil, or at least the Codicil, might be established, and the Trusts thereof carried into execution ; and that it might be declared that, under the circumstances, and by the means aforesaid, the Plaintiff had become entitled to the Monies to arise by the Sale of the Copyhold Estate : and that the Estate might be surrendered to him.

Hodsoll, in his Answer, said he had been advised that the Plaintiff, as Administrator of his Wife and her Children, was not entitled to any Interest in the Copyhold Estate, but that the same, in the events that had happened, belonged, in Equity, to the Customary Heir of the Testator, if there were any such Heir, and if not, then that he, the Defendant, as the surviving Trustee under the Will, was entitled to the Estate, for his own use, he being seised of the legal Estate, and there being no Equity to convert him into a Trustee for any other person than the Customary Heir : that he had always understood that the Testator was illegitimate ; and that, his Children being all dead, there was no Heir of the Testator then in existence, nor any Heir of *Joseph Lambe*, or of *Harriott Lambe*.

At the Testator's death the Copyhold Estate was subject to three Leases, one of which expired in 1821, and the two others in 1825. The *Master*, in obedience to the Decree, had advertised for the Testator's Cus-

tomary Heir; but no person was found to claim that character; and the Lord of the Manor was not a party to the Suit.

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The Cause now came on for further Directions.

Mr. *Sugden* and Mr. *Sidebottom*, for the Plaintiff:—

By the Codicil, the Copyhold Estate was converted, not for any partial purpose, but out and out into Personalty. The Sale was not to be delayed until the expiration of the Leases; for the Testator says that, if it should please God to take his Wife before that time, the Copyhold should be sold by public Auction. There is, therefore, no event in which it is not to be sold.

The Children took immediate vested Interests in their shares of the Monies to be produced by the Sale; for supposing (which is by no means certain) that they did not take vested Interests in the Legacies given them by the Will, the words used in the Codicil, "as directed in the Will," do not qualify the prior Gift, but relate merely to the investing.

If, however, the Children did not take vested Interests, the Shares resulted to the Customary Heir; and as the Property was impressed, by the Testator, with the character of Personalty, it was unimportant whether the purposes, for which the Estate was to be sold, were or were not existing at the time when the Sale was to take place, and therefore the Shares resulted to the Heir, as Personalty. *Fletcher v. Ashburner* (a), *Wright v. Wright* (b).

Mr. *Shadwell* and Mr. *Pemberton*, for the Defendant, *Hodsoll*:—

(a) 1 Bro. C. C. 497.

(b) 16 Ves. 188.

1827.

BURTON
v.
HODSOLL.

The question is, whether, in the events that have happened, there is any Trust affecting the Copyhold Estate; and, in order to decide that question, we must look at the manner in which the Testator has dealt with his Freeholds. Now he has given that part of his Property to his Trustees in Trust for his Wife, for her Life, and, after her decease and his Children attaining Twenty-one, to be equally divided amongst those Children. The division, therefore, was to depend upon the contingency of the Children attaining Twenty-one; and, if they did not attain that age, they were to take nothing under the Will, and it is quite clear that there was no authority to sell the Freeholds, except upon the happening of that event.

The words in the Codicil, "as above directed," mean, as directed in the Will; therefore, there is no Gift to the Children of the produce of the Copyhold Estate, except in the event of their attaining Twenty-one. All the Leases of the Copyhold were subsisting at the death of the surviving Child. When the last Lease expired, all the Children were dead; and, therefore, the period at which the Estate was to be sold, did not arrive until all the purposes for which the Sale was directed to be made had failed; and the Court will not hold that real Estate is converted into Personalty, where there is no person for whose benefit the conversion is to take place; and the consequence is that, as the legal Interest remains in the Defendant *Hodsoll*, he is entitled to hold the Estate for his own benefit. *Cruse v. Barley* (c);

Burgess v. Wheate (d); *Spink v. Lewis* (e); *Smith v. Claxton* (f).

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Mr. Sugden, in Reply:—

The Property in question was, at all events, to be sold at the expiration of the Leases. If the direction for sale, without its being in the power of any one to control it, impressed the Estate with the character of Personality, how can it be contended that the conversion was not absolute? It cannot alter the Case that the Widow died before the period of sale; because the Testator has said that, although she died before that period, the Property should be sold. It is immaterial whether the Children took vested Interests or not. But I apprehend that they took vested Interests; for the *corpus* of the Property is to go to them on their attaining Twenty-one, and there is no Gift over; and, therefore, the Case did arrive in which it was necessary to sell the Estate, as they took vested Interests; and the Shares, having vested in the Children, became transmissible as Personal Estate. But if the Court should be of opinion that the Children did not take vested Interests, then there is a resulting Trust for the Heir. *Ackroyd v. Smithson* (g), *Cruse v. Barley* (h), and *Smith v. Claxton* (i).

The *Vice-Chancellor* did not deliver any Judgment in this Case, but sent, to the Parties, Minutes from which the following Decree was drawn up.

“ This Court doth declare, that the said Defendant ought not to be permitted, in Equity, to avail himself of

(d) 1 Eden, 177.

(g) 1 Bro. C. C. 503.

(e) 3 Bro. C. C. 355.

(h) *Ub. sup.*

(f) 4 Madd. 484.

(i) *Ub. sup.*

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the Contingencies which have happened in the Testator's Family, to retain the Estate for his own benefit; and it appearing, by the *Master's* said Report, that no Person hath been found to sustain a claim, to the said Estate, as a resulting Trust of real Estate for the benefit of the Customary Heir, against the Personal Representatives of the next of Kin claiming the same as converted, by the Codicil, into the nature of equitable Personal Estate, this Court doth declare that the said Defendant, *John Hodsoll*, is bound to surrender the said Copyhold Estate to the Plaintiff, as being the legal Personal Representative of the Children of the Testator, as if the said Estate had been sold, and the Money held by him for the purpose of distribution according to the Trusts of the said Codicil; and, therefore, this Court doth order and decree that the said Defendant do, at the expense of the Plaintiff, surrender the said Copyhold Estate to the Plaintiff and his Heirs, as being the legal Personal Representative of the Testator's Children. But this Court doth declare that the surrender of the said Copyhold Estate, so to be made to the Plaintiff, is to be without prejudice to any question, which a Customary Heir of the Testator, or of the Children of the said Testator, may raise, whether the Money which would have arisen from the sale of the said Copyhold Estate, if the same had been sold by the Defendant pursuant to the Trusts of the Codicil, would have vested in such Children in the nature of Real or Personal Estate."

RUSHTON v. TROUGHTON.

AFTER Exceptions to the Defendant's Answer had been allowed, but before the *Master's* Report was filed, the Plaintiff obtained an Order for liberty to amend his Bill, and that the Defendant might answer the Amendments and Exceptions at the same time.

Mr. *Heald* and Mr. *Koe* now moved to discharge that Order for irregularity, on the ground that it was obtained before the Report was filed, and therefore before the Court considered it to be made. They referred to Ord. Cha. Ed. Beames, 292 ; *Job v. Barker* (a), *Whitehouse v. Hickman* (b), and *Wynne v. Jackson* (c).

Mr. *Bickersteth*, for the Plaintiff, said that the delay in filing the Report was merely accidental ; and that if the Order were discharged, the Plaintiff might obtain, on the same day, an Order to the same effect, by Petition, at the Rolls.

The VICE-CHANCELLOR :—

I cannot alter the Practice of the Court. All that I have to do is to inform myself of the Practice, and to adhere to it. The Report was a nullity until it was filed. The Order of the 29th of October 1692 is in these terms : "Whereas," &c. His *Honor* here read the Order, and then granted the Motion.

(a) 2 Swans. 255.

(b) 1 Sim. & Stu. 102.

(c) 2 Sim. & Stu. 226.

1827 :
4th August.

Practice.

An Order to amend, and for Defendant to answer Amendments and Exceptions at the same time, obtained before the filing of the Report allowing the Exceptions is irregular.

THE ATTORNEY GENERAL *v.* THE MAYOR
OF ROCHESTER (a).

1827 :
6th August.

Charity.

Where Charity Estates are directed by the Founder to be leased for 21 years, the Court has no authority to order them to be leased for 99 years.

THE late *Vice-Chancellor* had directed a reference to the *Master* to inquire whether it would be beneficial to the Charity that the Estates should be let for terms of Ninety-nine years, instead of Twenty-one, as required by the Will of the Founder.

The *Master* had reported in the affirmative, and this was a Petition to confirm the Report.

THE VICE-CHANCELLOR :—

As an Order for reference to this effect has been made by the Judge who preceded me, I shall confirm the Report ; but I would not take such a Lease under the Order of this or any other Court of Equity. There must be an Act of Parliament to render legal such a deviation from the Founder's intention.

(a) *Ex relatione.*

BALL v. BALL (a).

THIS was the Petition of Mrs. *Ball* and her Daughter, *Emily Owen Ball*, a Child about fourteen years of age, praying that the Daughter might be placed under the Mother's care, she offering to maintain her at her own expense, or that the Mother might be permitted to have access to her Daughter at all convenient times.

Mr. *Shadwell* and Mr. *Bickersteth*, for the Petitioners, stated that the Father was living in habitual adultery with another Woman, on account of which Mrs. *Ball* had obtained a Divorce in the Ecclesiastical Courts.

[The VICE-CHANCELLOR :—

This Court has nothing to do with the fact of the Father's adultery, unless the Father brings the Child into contact with the Woman. All the Cases on this subject go upon that distinction, when adultery is the ground of a Petition for depriving the Father of his common-law right over the custody of his Children.]

That does not appear to have been done by the Father here : but the Petition is in the alternative ; it prays for liberty of access. The Child formerly lived with her Mother, and occasionally was allowed to go to her Father. On one of those occasions the Father, without any communication with the Mother, detained the Daughter, and sent her to a school, and the Mother was ignorant for a long time what had become of her Child ; and when, after

1827 :
6th August.

Parent & Child.
Jurisdiction.

The Court has no Jurisdiction to deprive a Father, though living in adultery, of the custody of his Child, unless he brings the Child in contact with the Woman with whom he is so living ; nor to order him to permit the Mother to have access to the Child, unless misconduct on his part is shown with reference to the Management and Education of the Child.

(a) *Ex relatione.*

1827.

BALL
v.
BALL.

most persevering search, the Mother found out the school, the mistress refused to allow the Mother to see the Child, except in her presence. We admit that there is no Case for taking away the Father's authority, but submit that there is a very good Case for granting the other alternative of the prayer of the Petition. The Child when with her Father, is living in a house where there is no society except that of a female servant of all work; but when she is with her Mother, she has the attention of a Mother whose conduct is entirely unexceptionable, and who has always endeavoured to impress upon her Child a proper regard towards the Father; and, in one letter from the Father, he thus expresses himself: "I should be most happy to see my Child put under her Mother's protection." In another: "The charge of my seeking to deprive the Mother of her Child is most false; if it had been true, my character would be stamped with that of a villain." Subsequently to these letters he secretes the Child from her Mother. The Affidavits go on to state that the Father's conduct was so gross and violent towards the Mother, when she went to him to make inquiries after the Daughter's residence, that it was dangerous for her to be in his presence. The question really is, whether a Child of fourteen years old is to be deprived, by the brutal conduct of the Father, of the company, advice and protection of a Mother, against whom no imputation can be raised?

The VICE-CHANCELLOR:—

Some conduct, on the part of the Father, with reference to the management and education of the Child, must be shown, to warrant an interference with his legal right; and I am bound to say that, in this Case, there does not appear to me to be sufficient to deprive the

Father of his common-law right to the care and custody of his Child. It resolves itself into a Case for Authorities; and I must consider what has been looked upon as the Law on this point. I do not know that I have any authority to interfere. I do not know of any one Case similar to this, which would authorize my making the Order sought, in either alternative. If any could be found, I would most gladly adopt it; for, in a moral point of view, I know of no act more harsh or cruel, than depriving the Mother of proper intercourse with her Child.

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v.

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I was myself Counsel in two Cases in which Lord Eldon refused Petitions precisely similar. *Smith v. Smith*, one of them, was precisely similar, in its facts, to the present Case; except that the Father's object there was to compel the Mother, by such means as those now complained of, to give up to him some property which was settled to her separate use. My course of argument in that Case was that, as the Law allowed the Mothers of Bastards to retain possession of their Children till the age of Seven, *a fortiori* must the Law allow the care of legitimate Children to be vested in the Mother. The Child in that Case was under Seven: The Lord Chancellor, however, refused the Order; and, before any further proceedings were had, either the Mother's or the Child's Death determined the question. That was a very strong Case; yet The Lord Chancellor held that the Court had not jurisdiction. The other Case was *Gallini v. Gallini*. There the Petition was on the ground of the Father's religious principles: he was a Catholic; but The Lord Chancellor refused, for such a reason, to take the Children away from the Father. We then pressed that access might be allowed to the

1827.

BALL

v.

BALL.

Mother; but The *Chancellor*, I am nearly certain, refused the Order.

Petition dismissed (b).

Mr. *Pepys* and Mr. *Knight* appeared for the Defendant, the Father of the Child.

6th August.

PEART v. BUSHELL (a).

Jurisdiction.
Solicitor.

The Court will not exercise its summary Jurisdiction to compel a Vendor's Solicitor to perform an Undertaking, given by him at the Sale, to do certain acts for clearing the Title to the Estate.

THIS was a Petition by a Purchaser, who had paid the Purchase-money for an Estate, to compel the Vendor's Solicitor to perform an Undertaking, which he had given at the Sale, to cause satisfaction to be entered up, at the Vendor's expense, upon any Judgments that might be found against one of the Parties through whom the Vendor's Title was derived; to procure Evidence of the deaths of certain other Persons, and a Covenant for the production of certain Deeds, unless the originals were delivered up to the Purchaser.

Mr. *G. Richards*, in support of the Petition, said that the object of the Petition was that the Court might, by its summary Jurisdiction over the Solicitor, compel the performance of the Undertaking. He admitted that he had not been able to find any instance of similar interference by Courts of Equity; but said that, at Law, the Jurisdiction of the Courts over Attornies was often exercised in such Cases.

(b) See *Wellesley v. Duke of Beaufort*, 2 Russ. 1.

(a) *Ex relatione*.

CASES IN CHANCERY.

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Mr. *Wray*, *contra*, was stopped by the Court.

1827.

The VICE-CHANCELLOR:—

PEART

v.

BUSHELL.

If any Order is made, it must be for the performance of every one of the items in the Undertaking. The nature of some of them is such that they may be impossible of performance; and then am I to throw the Solicitor into prison until he has performed them, when it may turn out that they cannot be performed? The Solicitor has undertaken to produce evidence of the deaths of two Persons. To perform this may be impossible. How then am I to act?

I think also that this is not such a matter as comes within my Jurisdiction. It is not, strictly, an undertaking in a Cause; so that it is not a proper Case for the Court to act on with its extraordinary authority.

The only remedy for the Petitioner is, when his possession is interfered with on account of any thing arising upon the matters in the Undertaking, to bring his Action for Damages.

I am very unwilling to make a Precedent where none can be found.

Petition dismissed.

1827 :
6th August.

Jurisdiction.

The Court has no Authority to advance part of the Fund in the Cause to enable indigent Parties to prosecute their Claims to it.

PECK v. BEECHEY (a).

THE Plaintiffs claimed to be entitled, as the next of Kin of the late Mr. *Nollekens*, to the Fund in this Cause. To make out their claim, it was requisite for them to have a Commission to examine Witnesses abroad ; and, being in indigent circumstances, they had obtained an Order for part of the Fund to be advanced to them, on the security of their Solicitor, to defray the expenses of the Commission. The Commission having been returned, the *Master* reported that the Plaintiffs had not established their Claim ; they nevertheless presented a Petition praying that they might be allowed the Expenses of the Commission.

Mr. *Pepys*, for the Petitioners, said that in *Cockerel v. Barber*, Lord *Eldon*, C. had granted a precisely similar Petition.

THE VICE-CHANCELLOR :—

Lord *Eldon* has expressed himself dissatisfied with his Order in that Case, and has said, from the Bench, that he did wrong in granting the Prayer of the Petition.

Petition dismissed with Costs.

(a) *Ex relatione.*

HALL v. JONES.

ONE of three Persons who had been jointly appointed Guardians of an Infant, having died, the *Vice-Chancellor*, without a reference to the *Master*, appointed the two Survivors Guardians of the Infant.

1827 :
8th August.

Guardian.
Infant.

Mr. *Wilbraham* appeared in support of the Petition.

MEMORANDUM.

ON the 29th of October 1827, Sir *Anthony Hart* resigned the Office of *Vice-Chancellor* of England, and was succeeded by *Launcelot Shadwell*, Esquire, who shortly afterwards received the honour of Knighthood, and was sworn in a Member of His Majesty's most honourable Privy Council.

KINGHAM v. MAISEY.

THE Bill stated that, in January 1822, *James Saunders* agreed, in writing, to sell a Cottage and Garden to *Bernard Saunders*: that *Bernard Saunders* paid the Purchase-money, and was let into possession: that, in May 1823, *Bernard Saunders* agreed, in writing, to

3d November.

Practice.
Injunction.

Motion by a Plaintiff for an Injunction to restrain an Action brought by one Defendant against a Co-defendant, granted.

1827.

KINGHAM
v.
MAISEY.

sell the Premises to the Plaintiff, in part satisfaction of a Debt; but that, in consequence of the small value of the Premises, no Conveyance had been executed: that *Bernard Saunders* remained in possession as Tenant to the Plaintiff: that the Defendant, *Maisey*, having notice of these Agreements, had prevailed on *James Saunders* to execute to him a Conveyance of the Premises, and had commenced an Ejectment against *Bernard Saunders*, to recover possession thereof: that *Bernard Saunders* appeared and pleaded to the Action, and entered into the usual rule to confess Lease, Entry, and Ouster: that, at the Trial of the Action, at the last Summer Assizes, the Plaintiff was nonsuited, in consequence of *Bernard Saunders* not appearing to confess Lease, Entry and Ouster: that in consequence thereof *Maisey* would be entitled to Judgment and Execution in the Action on the first day of the ensuing Term. The Bill prayed for a specific performance of the Agreements: that *James Saunders* and *Bernard Saunders* might join in conveying the Premises to the Plaintiff: that the Conveyance to *Maisey* might be set aside for Fraud; and that he might be restrained from proceeding in the Ejectment, or commencing any other proceedings at Law against *Bernard Saunders*, to recover possession of the Premises.

Mr. *Wakefield*, for the Plaintiff, now moved for an Injunction as prayed by the Bill, which was granted by The *Vice-Chancellor*.

GARTHWAITE v. ROBINSON.

WILLIAM HANCOCK, Esquire, made his Will, dated the 20th of March 1796, and, after making several pecuniary Bequests, gave and bequeathed, except as before excepted, to Sir *Francis Buller* and *William Hussey*, all his Effects and Substance, of whatsoever kind and wheresoever, in Trust to carry into execution the whole intents and purposes of his Will, and of any Codicil that might thereafter attend it. The Testator then proceeded in the words following: "Now, if any Surplus should remain after all the preceding Articles are complied with, then it is my Will and Desire that the Produce and Profits of that Surplus be applied and given to my Daughter, *Maria Robinson*, for her to enjoy the benefit thereof during her life; and, after her decease, to dispose of the same, in such manner as she thinks fit, amongst all or one or more of her Children, if she should have any; and, if she hath none, then amongst my present or future Grand-children, or their respective Issue, as she likes best. I do not mean to direct that such Grand-children should have share and share alike, but to be conformable to Merit, or to Want not brought on by Vice, Folly or Dissipation, of which the Distributor or Distributors for the time being are to be the sole judges."

The Testator made a Codicil to his Will, which was partly as follows: "If my Daughter, *Maria Robinson*, shall die in my lifetime, leaving no Issue, then I will and direct that my Executors and Trustees, or the

1827:
7th and 28th
November.

Will.
Construction.
Power.

Power to appoint, amongst Testator's present or future Grand-children or their respective Issue, does not authorize the Donee to exclude the Children of a deceased Grand-child, who were living at the Donee's death.

1827.
 GARTHWAITE
 v.
 ROBINSON.

Survivor of them, or their Successors, shall dispose of all the Residue of my Estate and Effects whatsoever, for the use of any one or more of my present or future Grand-children, and under such Terms and Limitations over as they in their discretion shall think fit."

The Testator died, leaving Mrs. *Robinson* and *Elizabeth Douce*, the Wife of *William Molyneux Marston*, and *Fanny*, the Wife of *John Douce Garthwaite*, his only Children; and also leaving *John Douce Garthwaite* and *Elizabeth Douce*, the Wife of *John Allnutt*, *Fanny Trelawney Jenings*, then *Fanny Trelawney Garthwaite*, *Sophia Le Souef*, then *Sophia Garthwaite*, *Edward Hancock Garthwaite* and *George Garthwaite*, the Children of *J. D. Garthwaite* and *Fanny* his Wife, his only Grand-children; Mrs. *Marston* as well as Mrs. *Robinson* having no Children. *Elizabeth Douce Allnutt* died in the lifetime of Mrs. *Robinson*, leaving *John Allnutt* the younger and *Anna Allnutt*, her only Children, her surviving.

Mrs. *Robinson*, by her Will, dated the 12th of November 1814, after reciting her Father's Will and Codicil, and that, since she had no Children of her own, and was not likely to have any, she was desirous of executing the Power, reserved to her by her Father's Will, of appointing his Residuary Estate and Effects amongst his Grand-children or their respective Issue: in exercise of that Power, directed and appointed that one-fifth Part of such Residuary Estate and Effects should be paid and assigned unto her Nephew, *John Douce Garthwaite*, one of the Grandsons of the said *William Hancock*, or to his Assigns; and that one other fifth Part thereof should be paid or

assigned unto her Nephew, *Edward Hancock Garthwaite*, another of the Grandsons of the said *William Hancock*, or to his Assigns; and she gave the remaining three-fifths Parts to Trustees upon certain Trusts for the benefit of *George Garthwaite*, Mrs. *Jenings*, and Mrs. *Le Souef*, for their Lives, and, after their Deaths, for their Children respectively.

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GARTHWAITE
v.
ROBINSON.

Mrs. *Robinson* died on the 13th of March 1827. The Master, in pursuance of a reference made to him in the progress of the Cause, reported that the testamentary Appointment made by Mrs. *Robinson*, was a due execution of the Power given to her by the Testator's Will over his Residuary Estate: in consequence of which, two Petitions were presented, one, by the Appointees, praying that the Report might be confirmed, and the other, by *John* and *Anna Allnutt*, praying the reverse.

Upon the hearing of these Petitions, one question was, whether, as Mrs. *Robinson* had not appointed any share of the Testator's Residuary Estate to *John* and *Anna Allnutt*, the Appointment made by her was not void.

Mr. *Girdlestone*, jun. and Mr. *Purvis*, in support of the Appointment:—

It cannot be disputed that Mrs. *Robinson* would have had, under her Father's Will, an exclusive power of appointment to her Children, if she had had any. The expressions, "as she thinks fit," and "as she thinks best," apply as well to the Grand-children, as to the Children. The Testator also says, "amongst my present or future Grand-children, or their respective Issue." He could not have used words better adapted for giving the most unlimited power of selecting, not only any

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GARTHWAITE
v.
ROBINSON.

Class, but any individual of a Class. The concluding sentence of the Will brings this Case within *Bevil v. Rich* (a). There is some apparent ambiguity created by the word "Distributors;" but it is removed by the Codicil, which was made the day after the Will; and, on looking at that Instrument, it is clear that the Testator, when using that word, had in view the execution of the Power by his Executors: and, if any doubt remains upon the question now under discussion, it is removed by the Codicil; for it is quite clear that the Executors were to have a power of selection, and the Power given to them relates to the same Fund and to the same Objects as the Power given by the Will does; and it cannot be supposed that the Testator intended his Executors to have a more extensive Power than his Daughter had.

Mr. Sugden and Mr. Teed, for John and Anna Allnutt:—

The Counsel in support of the Appointment have not read the first sentence of the Testator's Will, according to its grammatical construction. The words, "as she thinks fit," do not govern the latter clause of that sentence. With respect to the Children, the Testator has given an exclusive Power, in technical and proper language. If he had had the same intention as to the Grand-children, he would not have varied the language. Then he concludes his Will by saying, in effect, that, though he did not intend his Daughter to exclude any of his Grand-children, but that she should give something to every one of them, he did not mean them to take share and share alike, but left it to her

(a) 1 Cha. Ca. 309.

to be the sole judge of the share that each was to have. This Clause would have been unnecessary, if he had given Mrs. *Robinson* the power of excluding any of the objects described in his Will. If that be so, the question arises, what are the Classes amongst which she is to appoint? Now it is impossible not to read the first "or" as "and," but the second must be taken disjunctively. We contend, therefore, that, under the true construction of this Will, Mrs. *Robinson* was bound to give every one of the Grand-children a Share, and that the words, "or their Issue," are substitutionary; that is, that if any of the Grand-children were dead, their Children were to come into their place. *Bevil v. Rich* has always been considered as a Case by itself; and it wants the strong technical word "amongst."

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ROBINSON.

The Codicil does not explain the Will, but gives a Power different from that conferred by the Will. The Codicil gives a Power to appoint to Grand-children only, and not to their Issue.

Mr. *Girdlestone*, jun. in reply:—

The words of the Testator's Will ought to be taken in their usual sense. But if the first "or" is to be construed "and," the second must have the same meaning put upon it; and then the Will will authorize the Appointment that has been made. The expression "as she likes best," is tantamount to "as she thinks fit," and brings this Case within those where such expressions as "to be at her disposal," &c. have occurred, and which have been held to authorize exclusive Appointments. The Will and Codicil were both written by the Testator himself, and therefore ought not to be

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looked at as if they had been prepared by his legal adviser.

The VICE-CHANCELLOR :—

The question is, whether the words of this Power authorize an exclusive appointment to the Testator's Grand-children? That question turns upon the grammatical construction of the sentence in the Will, in which the Power is given. I agree that it is impossible to carry on, to the latter part of the sentence, those words in the former part, which, as has been admitted, give a power of selection as to the Children. The word " amongst," too, implies that each of the objects of the Power should have a share.

The next question is, who are the Persons amongst whom the Appointment is to be made? Now it appears to me that what the Testator meant was, that *Mrs. Robinson* should dispose of his Residuary Estate amongst such of his present and future Grand-children as should be living at her death, and the Issue of such of them as should be then dead : and, as *Elizabeth Douce Allnutt* died in the lifetime of the Donee of the Power, leaving children, and this Lady, in executing the Power, has not included those Children, I am of opinion that the *Master's* Report is wrong. Therefore dismiss the Petition that prays that the Report may be confirmed ; and declare that *Mrs. Robinson* has not made any valid Appointment of the Testator's Residuary Estate.

WATKINS v. STONE.

THE Defendant, *Stone*, had put in a Plea and Answer to the Bill, which was overruled upon Argument; but the Court gave him liberty to plead *de novo* (a): whereupon he put in the following Plea:

“ The Plea of *William Owen Stone*, one of the Defendants to the Bill of Complaint of *Elizabeth Watkins* and *Virginia Watkins*, Complainants. This Defendant, by protestation, &c. as to all the discovery and relief by the said Bill sought from and prayed against this Defendant, doth plead in bar thereto, and for Plea saith that *Philadelphia Watkins*, in the said Bill named, being seised in Tail of the Hereditaments and Premises in the said Bill mentioned, and called *The Pant*, a Fine sur Conuzance de Droit come ceo, &c. was, in or as of Trinity Term 1822, levied in due form of Law before the Justices of the Court of Common Pleas at *Westminster*, between *John Price*, Plaintiff, and the said *Philadelphia Watkins*, Defendant, of the said Hereditaments and Premises called *The Pant*, by the description of three Messuages, three Gardens, &c. with the Appurtenances, in *Lanvetherine*, and also one annual Rent of 4*l.* 5*s.* 2*d.* issuing out of the Tenements aforesaid; upon which Fine, Proclamations were duly made according to the form of the Statute in that case made and provided, as in and by such Fine, &c. And this Defendant doth aver that the said Hereditaments and Premises called *The Pant*, of which such

1827.
8th November.

Pleading.
Disclaimer.

To a Bill praying a Re-conveyance of four Estates, the Defendant put in a Plea of a Fine as to one, concluding with a Disclaimer as to the others: the Plea was overruled.

(a) See 2 Sim. & Stu. 560. The page is incorrectly numbered 590.

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v.

STONE.

Fine was levied as aforesaid, are the only part of the Hereditaments and Premises claimed by the said Bill of Complaint in which this Defendant has or claims, or ever had or claimed any Estate, Right, Title or Interest; and that *Ann Constable*, in the said Bill named, was the Daughter of the Father of the said *Philadelphia Watkins*, by a different Mother. And this Defendant therefore pleads the matters aforesaid in bar to the whole of the said Bill, and humbly demands," &c.

Mr. *Sugden* and Mr. *Turner*, in support of the Plea:—

It may be contended that the Plea is irregular, as being a Plea and Disclaimer; and that the Defendant ought to have answered as to all the Estates, except *The Pant*: but, if the Defendant pleads Title to *The Pant*, and avers that he has no right to any of the other Estates, the averment makes the Plea a good Defence to the whole Bill. The right to have an account of Rents, flows from the right to the Estate; and, if the right to the Estate is excluded, every accessory to it must cease.

Mr. *Pepys* and Mr. *Jacob*, in support of the Bill:—

The Bill claims Title to four Properties: *Gelly Vawr*, *Gelly Vach*, *The Pant*, and *The Pack-horse*. The Plea admits that the Fine had reference to *The Pant* only; and there is no allegation, in the Plea, that applies to the three other Properties. If the Fine is good as to *The Pant*, it leaves the rest open, and allows us to redeem the rest of the Property. Next, this Defence is of a totally novel nature: it is a Disclaimer coupled with a Plea. Now, a Plea must be single; but here are two

Defences which are totally distinct from each other. They tender two Issues. Suppose *The Pant* to be quite out of the question, and that the Bill had alleged that, as to the other Properties, the mortgages had vested in the Defendant, could he have disclaimed? The Plea admits all that is not pleaded to; therefore, we must take it as true that these Estates were mortgaged to the Defendant. A Party charged cannot disclaim. An Executor who is called upon to account for his Testator's Assets, cannot disclaim all title to the Property. It is no answer to a Bill praying for a conveyance of an Estate, for the Defendant to disclaim all Interest in the Estate. The only case for a Disclaimer, is where a Person is made a party to a Suit as claiming some interest in the Property in dispute. We state that we have applied for an Account of Rents of the three other Estates. Why has not this Account been rendered to us? The Defendant does not deny our Title to these Estates, which were vested in him. He is bound to discover in whom they are now vested. We are entitled also to the Title-deeds of these three Properties, and to have a Discovery from the Defendant whether he has or has not got them. The Plea admits that the Defendant claims part of the 1,500 *l.* which we are to pay, and therefore he is a necessary party to the Suit.

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Mr. *Turner*, in reply:—

This Plea is an allegation, on the part of the Defendant, that he has not, nor ever had any Interest in the three other Estates. If it be true that the Defendant had no right to these Estates, his Possession would be under an adverse Title, and it could not be competent to the Claimants to make him a Trustee for them. The Plea amounts to an allegation that the

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Plaintiffs have no Title to *The Pant*, and that the Defendant has none to the other Estates, and consequently it is a Defence to the whole Bill. What mischief will accrue to the Plaintiffs from this form of Plea? Suppose they reply to the Plea, and prove that the Defendant had a right to the three Estates, they will be in the same situation as any other Plaintiff who disproves a Plea, and will be able to examine the Defendant on Interrogatories.

The VICE-CHANCELLOR:—

This Plea first states the Fine, and then what is said to be a Disclaimer. Now a Plea may state any number of matters that make one Defence: but here the Defendant first pleads, and then avers something totally disconnected with the Plea. I confess it appears to me that this Plea cannot be supported, as it is a double Plea.

Plea overruled.

13th November.

CARTER v. DRAPER.

Practice.
Cross-examination.

—
A Party who omits to cross-examine a Witness under a Commission at the usual period, will be allowed

to exhibit Interrogatories for that purpose on a subsequent day.

ON the 25th of October, one *Butler* had been examined, under a Commission, as a Witness for the Plaintiffs; and, when his examination was finished, was tendered to the Defendants, in the usual manner, for cross-examination. The Defendants, however, did not offer any Cross-interrogatories, but sent an intimation to the Commissioners that they intended to cross-

examine the Witness upon Interrogatories to be thereafter administered, which was objected to by the Solicitor for the Plaintiffs. On the 3d of November the Defendants obtained an Order for liberty to add Interrogatories to those already exhibited by them for the examination of their own Witnesses, and for the cross-examination of the Plaintiffs' Witnesses.

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Mr. *Spence*, for the Plaintiffs, now moved to discharge the Order, as to the adding of Cross-interrogatories, for irregularity.

The question is, whether a Party may, as a matter of course, delay filing his Cross-interrogatories, until the Witness has finished his examination in chief. One can see the principle of the distinction between allowing Interrogatories to be added for examination in chief, and for cross-examination; for, in the latter case, they are leading; and therefore it is more dangerous, in the former case, to let the time go by, than it is in the latter, as the Party has thereby an opportunity of talking to the Witness.

Mr. *Kindersley*, for the Defendants :—

In the Examiner's Office a Party may, at any time, exhibit either Interrogatories in chief, or Cross-interrogatories. The mischief which may arise from exhibiting the additional Interrogatories, is the same, whether the examination takes place before the Examiner, or before the Commissioners. The reason why an Order is necessary in the latter case, is that the authority of the Commissioners is limited, by their oath, to the Interrogatories originally left with them: but that is

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not the case with respect to the Examiner. *Campbell v. Scougal* (a).

Mr. Spence, in reply :—

The passage cited from the Judgment in *Campbell v. Scougal*, is too indefinite to enable the Court to judge what was the opinion of the *Lord Chancellor* upon a subject which was not brought before him. The difference between the Examiner and Commissioners, is that the latter are appointed by the Parties, and therefore the Court looks more strictly at their conduct ; but the former is an Officer of the Court, and is perfectly independent of both Parties. No instance of an Order similar to the one in question, has been or can be produced. If this Order stands, no Party will in future exhibit Cross-interrogatories, until his adversary's Witnesses have all been examined.

The VICE-CHANCELLOR said that what fell from Lord *Eldon*, C. in the Case that had been cited, seemed to support the practice as contended for by Mr. *Kindersley*, and refused the Motion.

(a) 19 Ves. 552. See 554 & 555.

JOHNSON v. CHIPPINDALL and Others.

ON the 3d of May 1824, the Bill in this Cause was filed, against the Defendant *William Chippindall*, and two other persons, for the usual Accounts of certain Real and Personal Estates. In May 1825, *Chippindall*, after having put in two insufficient Answers, absconded. On the 5th of that month, an Order was made, in the Cause, for the Serjeant-at-Arms to apprehend him. To this Order the Serjeant-at-Arms returned *non est inventus*: whereupon, on the 21st of the same month, a writ of Sequestration was issued against *Chippindall's* Estate and Effects. The Sequestrators were not able to discover any Property of *Chippindall's*, except an Annuity of 250*l.* secured to be paid, quarterly, by the Bond of *Rowland Yallop* (who was not a party to the Cause) dated the 16th of March 1825, the first payment of which became due on the 1st of April in that year; and which Annuity was, under a proviso in the condition of the Bond, subject to be redeemed, by *Yallop*, on certain terms therein specified. On the 30th of September 1825, the Sequestrators served *Yallop* with notice of the Sequestration, and required him not to pay the Annuity to *Chippindall*, or any person on his behalf. On the 20th of February 1826, the Plaintiffs, on an Affidavit stating the previous matters, and also that *Chippindall* was indebted to them in 10,000*l.* and upwards, moved for an Injunction to restrain *Chippindall* from proceeding in an Action which he had commenced against *Yallop* for the arrears of the Annuity; and also to restrain *Chippindall* from receiving, and *Yallop* from paying to him the arrears and future payments

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14th & 15th
November.

1828:
16th January.

Sequestration.
Chose in Action.

The Court has no Jurisdiction to order, upon Motion, a Person not a Party to the Cause, to pay into Court the Arrears of an Annuity granted by him to a Defendant against whom a Sequestration has issued for want of a sufficient Answer, unless the Grantor has, by his conduct, waived the objection to the jurisdiction. But he may, notwithstanding, and without applying for the leave of the Court, obtain, from the Grantee, a Release of the Annuity.

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of the Annuity ; and, on hearing Counsel for Mr. *Yallop*, an Injunction was ordered accordingly. On the 14th of March 1826, the Plaintiffs obtained an Order that *Yallop* (who appeared by Counsel on this occasion also) should pay the arrears and future payments of the Annuity into Court. *Yallop*, in obedience to this Order, paid 178*l.* 5*s.* 6*d.* into Court. An arrangement was afterwards made, between *Yallop* and *Chippindall*, by which it was agreed that the latter should release the Annuity, and all the arrears thereof, on receiving 990*l.* from the former ; and, on the 30th of June 1827, a deed of release was executed accordingly. On the 23d of July 1827, the Plaintiffs served *Yallop* with a notice of Motion for him to pay into Court, in obedience to the Order of the 14th of March 1826, 312*l.* 10*s.* the arrears of the Annuity, or, in default thereof, that he might stand committed to the custody of the Serjeant-at-Arms. *Yallop*, upon receiving this notice, served the Plaintiffs with a notice of Motion to discharge the Order of the 14th of March 1826 ; and, on the 3d of August 1827, made an Affidavit, in support of his Motion, in which he deposed that, in 1820, the Defendant *William Chippindall* admitted him into Partnership, in the business of an Attorney, upon payment of a Premium of 2,000*l.* : That, in January 1822, *Chippindall*, in compliance with the terms of the Partnership, retired from Business, upon an Annuity of 500*l.* to be paid by *Yallop* : That, in 1824, *Chippindall*, in consequence of the profits of the business being much less than he had represented them to be when the Partnership was formed, consented to reduce the Annuity to 250*l.*, upon which the Bond before-mentioned was executed : That *Chippindall*, notwithstanding his retirement, had agreed to assist *Yallop* in the business, and

to recommend Clients to him : That *Yallop* had been deprived of these benefits by *Chippindall's* absconding : That the business had, in consequence, become much less profitable than it was when the bond was executed ; and that *Yallop* was 2,000*l.* out of pocket, besides the Premium : That he had frequently complained to *Chippindall's* Agent of the hardship of paying the Annuity, and threatened to get relieved from it, on the ground of misrepresentation as to the profits of the Business : That, after much discussion, the Agent agreed that the Annuity should be released on the payment of 990*l.*, being four years purchase, which was a fair price, as *Chippindall* was then in his sixty-sixth year : That the Release was accordingly executed by *Chippindall*, and the Bond given up and cancelled : That *Yallop*, when the Order of the 14th of March 1826 was obtained, had no idea that it would have prejudiced any right that existed as between himself and *Chippindall* in relation to the Annuity, or that he should have been precluded from obtaining a redemption of it, if it was his interest so to do.

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The following Letters were written by *Chippindall* to the Plaintiffs' Solicitors :

" Gentlemen, Calais, 29th Nov. 1826.

" As Mr. *Yallop* has never paid me but one half-year's Annuity secured by his Bond, and I know you can easily compel him to pay the arrears into Court, and more particularly as I am nearly without Money ; if you would have the kindness (at my expense) to move that he may pay all the arrears into Court, it would render me most essential service."

" Gentlemen, Calais, 31st May 1827.

" I understand from my Son *William*, that the terms

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you now propose and mean to abide by, are to the same effect as those originally proposed, with this difference, that I am to give up to your Clients half the arrears of the Annuity, and also 50*l.* per annum out of the future payments. Perhaps I might consent to this on your Clients paying *Stutely's* demand, provided this arrangement is immediately carried into effect.

" I take this opportunity of expressing my astonishment that you have allowed the arrears of the Annuity, to the amount of 312*l.* 10*s.*, to remain in the hands of Mr. *Yallop*. I cannot conceive what right you have to destroy me and my family, to make them the victims of your notions of delicacy, for that it seems is the reason you assign for not proceeding against him, he being a professional man; neither can I see how you can reconcile it to yourself to sacrifice the interests of your Clients to the same false principle of delicacy; for I much fear that you will now find that this neglect on your part to enforce the payment of the arrears for the last twelve months, will be the great obstacle to the speedy arrangement of this business, as I will not settle until all the arrears are in Court."

The following Letters were written by *Yallop* to the Solicitors of the Plaintiffs, in the course of the Proceedings before detailed :

" I shall be obliged if you will let this Motion stand until the 4th Seal (the 14th), when I will move to pay the Money into Court, on or before the first day of Term. Yours, &c. *

" I shall feel particularly obliged if you will not for the present press the payment of *Chippindall's* Annuity ;

* There was no date to this Letter.

there is but one quarter due ; according to the terms of the Order, another will be due on the 1st of July, when I shall be in a better situation than at present to meet this unreasonable demand. I am, &c.

“ 5th May 1827.”

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“ Inclosed I send you an Affidavit, respecting the payment of 200*l.* for your perusal, and, if you approve of it, I will immediately swear to it, and, within a week from this Day I will pay the Balance into the Bank ; and, if I do not, you shall be entitled to your Order. Under these circumstances I trust you will not press your Motion, a proceeding which I cannot help feeling, as against me, extremely harsh ; as I am satisfied, if I had, at the period when the Order was made, or even now, were to oppose the payment, your Injunction would not stand for a moment.

“ 3d June 1827.”

Yallop wrote two other Letters also to the Plaintiffs' Solicitors, one dated the 27th of June and the other the 10th of July 1827, in which he requested them to return an Affidavit he had sent them for their approval, in order that he might have it sworn, and the Balance paid into Court.

Mr. *Sugden* and Mr. *Cooper* for Mr. *Yallop* :—

As Mr. *Yallop* was not one of the Parties to the Cause, the Orders that have been made in it could not prevent his obtaining a release of the Annuity. As the subject has ceased to exist, the operation of the Orders must cease also. But, supposing this Annuity to be still existing, then two questions arise : 1st, whether a *Chose in Action* can be taken under a Sequestration ; and 2d, if it can, whether the Person who is liable to the demand

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must not be a Party to the Suit. The earliest Case upon this subject is *Lakes v. Meares* (a), which was decided five years before the date of Lord Bacon's Orders (b); and, as is observed in *Fenton v. Lowther* (c), it does not appear that the Order was not made on a Bill filed. All the early Cases upon this subject are referred to in the argument in *Simmonds v. Lord Kinaird* (d). The later Cases are *Dundas v. Dutens* (e), *M'Carthy v. Goold* (f), in which it was considered that the Debtor must be a Party to the Suit. The only Case in which he was not a Party, is *Pelham v. The Duchess of Newcastle* (g), but there the Order was not opposed. In *Franklyn v. Colhoun* (h), the opinion of the Lord Chancellor was against the Motion, and no Order was made upon it, as appears on searching the Registrar's Book; but the Order for payment of the Money into Court, was made in the interpleading Suit (i), although the Report states differently; and the two other Causes were finally compromised. *Hide v. Petit* (j), and *Fenton v. Lowther* are strong Authorities in our favour. It will, perhaps, be said that a Sequestration is analogous to an Outlawry. But Debts could not be taken in execution under an Outlawry (k), and all the subsequent Proceedings are in the Exchequer, and the King directs payment of the Debt *ex gratia* only. In *Morrice v. Governor*

(a) Toth. Transact. 175.

(b) See Ord. Ch. Ed. Beames, 16.

(c) 1 Cox. 315.

(d) 4 Ves. 735.

(e) 1 Ves. J. 196.

(f) 1 Ball & Beatt. 387.

(g) 3 Swanst. 290, note.

(h) Ibid. 276.

(i) The Order here alluded to, was not passed and entered; but, in the Registrar's Minute Book, it is intitled in all the three Causes.

(j) 2 Freem. 125. See Jacob's Rep. 52.

(k) 2 Roll's Ab. 806; 1 Tidd's Pract. 156, 7th ed.

& Company of the Bank of England(l), Lord Talbot, C.
treats a Sequestration as a more extensive *feri facias*.

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Mr. Horne, Mr. Wakefield and Mr. Lynch, for the
Plaintiffs:—

The Case of *Hide v. Petit*, as reported in 1 Ch. Ca. 91, differs from the Report in Freeman, and is in our favour; and so is *Francklyn v. Colhoun*. On reading the Judgment in that Case, it appears that The Lord Chancellor was clearly of opinion that *Choses in Action* were the subjects of Sequestration, and that the only doubt was how they were to be made available; whether by Suit, or by Order without Suit: for the Lord Chancellor says, "The true question is," &c.(m). *Yallop* was a Party to the Order for the Injunction. That Order has not been appealed from, and we are now acting upon it. *Yallop*, in the Correspondence which took place between him and the Solicitors of the Plaintiffs, not only offers to pay the Money into Court, but to make the Motion himself. Is it consistent with good faith that this Gentleman, after having made these offers, and acquiesced, in the Orders that have been made, down to the present time, should oppose our Motion, and object to the Jurisdiction? He has waved all questions as to the Jurisdiction, and has submitted to pay the Money upon Motion.

It can be shown, by a series of Authorities, that *Choses in Action* have been rendered available to Sequestration, and it is only where there is an Account to be taken that a Bill must be filed. That is the distinction

(l) Ca. Temp. Talb. 217. 222.

(m) See 3 Swanst. 309.

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between *Simmonds v. Lord Kinnaird* and the present Case. There are two Cases to that effect in *Tothill, Lakes v. Meares* (n), and *Roane v. Stepney* (o). If a Party against whom a Sequestration issues, is in possession, the Sequestrator takes possession; but, if the Property is in the hands of a third person, the Sequestrator must be aided by an Order of the Court. Thus Tenants of a sequestrated Estate are ordered to attorn to the Sequestrator. *Hide v. Petit* (p), *Marquess Caermarthen v. Hawson* (q), *Lord Pelham v. Duchess of Newcastle* (r), *Opie v. Maxwell* (s), *Barrington v. Hereford* (t), *Fenton v. Lowther* (u), *M'Carthy v. Gould* (x), *Francklyn v. Colhoun* (y), *Rowley v. Ridley* (z).

The release of the Annuity is a mere collusive proceeding between *Chippindall* and *Yallop*, and is a mere nullity. *Witham v. Bland* (a), *Coulston v. Gardiner* (b), *Bird v. Littlehales* (c), *Hamblyn v. Ley* (d); and Mr. *Yallop* does not venture to swear that he has paid the Consideration Money for the Release.

Mr. *Sugden*, in reply:—

No dictum has been produced that a *Chose in Action* is properly the subject of a Sequestration. In *Pelham v. Duchess of Newcastle*, the Banker was willing to get rid of the Money, and the objection was not taken.

- | | |
|----------------------------|---------------------------|
| (n) <i>Ubi Supra.</i> | (x) <i>Ubi Supra.</i> |
| (o) Trans. 176. | (y) <i>Ubi Supra.</i> |
| (p) <i>Ubi Supra.</i> | (z) Cited 4 Ves. 746, and |
| (q) 3 Swanst. 294. | see 3 Swanst. 306. |
| (r) Ibid. 290. | (a) 3 Swanst. 276, 277. |
| (s) Cited 4 Ves. 742. 744. | (b) Ibid. 279. |
| (t) Ibid. 743. | (c) Ibid. 299. |
| (u) <i>Ubi Supra.</i> | (d) Ibid. 301. |

It was admitted that he might have filed a Bill of Interpleader. The Case of *Hide v. Petit*, as reported in 1 Ch. Ca., turns upon the validity of the Award; and it is stated, *totidem verbis*, that the matter did not come in question. All the Cases cited, in *Simmonds v. Lord Kinnaird*, in favour of a *Chose in Action* being taken under a Sequestration, are answered by the opposite Counsel.

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The object of a Sequestration is to drive the Defendant to put in an Answer speedily. Can any thing be so absurd as to hold that his Debts may be taken? Can a Sequestrator bring an Action for them? No; a Bill must be filed. Supposing the Claim is a litigated one, how will the object then be answered? The intention of the process was to put the strong arm of the Court upon what was tangible, and could be taken at once.

The Court cannot decide against Mr. Yallop, without overruling *Fenton v. Lowther*. In *Simmonds v. Lord Kinnaird*, the Lord Chancellor says: "I wish the process could go to the extent you desire." It is clear, therefore, that he was of opinion that he had no jurisdiction in that Case.

At all events, if *Choses in Action* are the subjects of a Sequestration, a Bill must be filed, and there is no Authority that they can be made available upon Motion. *Fenton v. Lowther*, and *Simmonds v. Lord Kinnaird*. If, in the latter Case, a Motion would have been sufficient, the Bill would have been demurrable upon that ground.

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As to the argument founded on Mr. *Yallop* having acquiesced in the Orders, he was ignorant, until he was informed by his Counsel, that the Court had no jurisdiction to make those Orders. His Letters are nothing more than an admission that the Order was binding upon him whilst it remained in force. He does not ask that the Money which he has paid into Court may be repaid to him.

The *Vice-Chancellor*, after stating the nature of the Suit and the Proceedings in it, and noticing that no notice of Motion had been given to discharge the Order of the 20th of February 1826, proceeded as follows:—

When the Motions were argued before me, it was stated that a similar question had been discussed in *Mallard v. Mallard*(e); but it appeared to me that there was a material distinction between the two Cases. Because in *Mallard v. Mallard* there was, on the first application, a resistance made; but, in this Case, it appears, by the Letters, that there has been an acquiescence in the Jurisdiction, on the part of Mr. *Yallop*, which has continued for a length of time; and therefore I ought not now to permit him to withdraw from the Jurisdiction.

I find no instance in which the Court has compelled a third party to pay in a *Chose in Action*, without a Bill, where any resistance has been made by the Holder of the *Chose in Action*. The old Cases are collected in the Notes to *Francklyn v. Colhoun*; but in none of them does it appear that any resistance was made. In *Pel-*

(e) Before Sir A. Hart, V. C. but not decided.

Ham v. Duchess of Newcastle, Child, the Banker, probably consented to the Order. The old Cases, therefore, leave it in doubt whether the Court has jurisdiction to make the Order upon Motion. But, if it had been a clear point, one would not have found such a Bill filed as in the Case of *Simmonds v. Lord Kinnaird*; for that was filed to give effect to the Sequestration; and, if it had been competent to the Court to make the Order upon Motion, one can hardly think that such a Bill would have been filed. The *Lord Chancellor* too expressed it as his opinion, that such a Bill could not be supported, on the general ground. (His Honor here read the Judgment in *Simmonds v. Lord Kinnaird*.) It cannot, however, be said that the Cases that have been quoted prove that there is any settled jurisdiction in this Court, to compel payment of the *Chose in Action*, upon mesne process. In *Wharam v. Broughton* (f), Lord *Hardwicke*, C., says: "For the Writ of Sequestration does not require the Sequestrators to levy to the use of the Plaintiff; but only to detain and keep in their hands till the Sum is fully paid, the Contempts cleared, and the Court make further Order to the contrary. It is not of a great many years standing that the Court has ordered Goods to be sold to satisfy payment after a Decree; but it is very lately that the Court has ordered it for a collateral Contempt in proceeding before a Decree, which the Court now does in aid of its Proceedings." So that Lord *Hardwicke* shows that he considered, the application of Sequestration to mesne process, as a modern thing, and that the Sequestrators were only to keep what they had seized, in their hands, until the Contempt was cleared. The difficulty,

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(f) 1 Vez. 184.

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therefore, is, what are the Sequestrators to do with the *Chose in Action* when the Contempt is cleared. Are they to hand it over to the Creditor, or to return it to the Debtor? There is the Form of the Order of Sequestration in *Pope v. Ward* (g). There the words "Personal Estate" are used: but those words do not carry the matter further than "goods and chattels," and are mere amplification. In *Angel v. Smith* (h), what Lord Eldon, C., says respecting this Writ, applies to Land. Then we come to *Francklyn v. Colhoun*, where The Lord Chancellor, speaking of this Process, uses this expression: "But a *Chose in Action* cannot be so taken:" and, in the absence of authority more cogent than I have referred to, this is sufficient to govern me. I observe that, in *Simmonds v. Lord Kinnaird*, The Solicitor-General says that Sequestrators claim for past Rents. But there is no possession of Land, except by taking the Rents as they had or did become due, unless the effect of the Process were to turn the Tenants out of possession; therefore that is not an Authority that a Sequestrator can lay hold of a *Chose in Action*. And, as there is no process at Common-law, except an Extent, to take Debts, I should not say that I could, upon mere Motion, compel this Party to pay in the *Chose in Action*; therefore I disclaim that Authority.

But, in this Case, there is matter which enables me to decide this point without reference to the Authorities. For, in the first place, the Motion of Mr. Yallop admits that the Order of the 20th of February 1826 is in full force: and it is not consistent with that Order for Mr. Yallop to say that he ought not to be compelled

(g) 1 Cox. 194.

(h) 9 Ves. 335.

to pay in the Arrears of the Annuity. Besides, it appears that a considerable Correspondence arose out of the Proceedings on this Sequestration. On the 29th of November 1826, *Chippindall* wrote to the Plaintiffs Solicitors. (His *Honor* here read the passage in that Letter, which is before inserted.) Mr. *Yallop*, in his first letter (*i*), which was written after the Order of February 1826, but before that of March 1826, says, (here his *Honor* read that and the next Letter.) By the expression "unreasonable demand," *Yallop* means that he considered the Annuity exorbitant, having regard to what preceded and followed the Grant. (His *Honor* here read Mr. *Chippindall's* Letter of the 31st of May 1827, and then proceeded). So that it is clear that *Chippindall* and *Yallop* both considered that, as between themselves and the Plaintiffs' Solicitors, there was a right in the Plaintiffs' Solicitors to have what was due. This Correspondence went on for several Months. But if Mr. *Yallop* had made resistance to the Proceedings at first, the Plaintiffs' Solicitors might have acted in a different manner from what they have done. Inasmuch, therefore, as the Motion is made under these circumstances, and does not seek to discharge the Order of the 14th of February 1826, I must make an Order according to the terms of the notice of Motion of July, and no Order upon Mr. *Yallop's* Motion.

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The Plaintiffs' Motion granted, and *Yallop's* refused,
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(i) The letter without date.

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On this day a Motion was made, by Mr. *Yallop*, to discharge the Orders of the 20th February and 14th March 1826. By an Affidavit in support of this Motion, he deposed that, some time in June 1826, when the Plaintiffs were pressing him for payment of the Annuity, he consulted with Counsel as to the legality of the said Orders, and was advised that the Court had not the power of making them, and that he was entitled to have them discharged ; and, being extremely desirous of getting rid of the payment of the Annuity, which he had always considered oppressive and unjust, he consented to enter into a negotiation with the Defendant *William Chippindall*, for the repurchase thereof, as he was advised he might safely do, and that, ultimately, the Contract for the redemption of the Annuity before-mentioned, was executed by *William Chippindall*: That it was agreed between him, *Yallop*, and *Robert John Chippindall* (who negotiated the purchase on behalf of *Wm. Chippindall*), that Bills of Exchange should be given by him, *Yallop*, to *William Chippindall*, payable at different periods, for 900 *l.* part of the sum agreed to be paid for the redemption of the Annuity, and that such Bills should not be handed over to *William Chippindall*, or be negotiated, but retained by *R. J. Chippindall*, in trust for *Yallop* and *William Chippindall*, until it should be decided, by the Court, whether such purchase could be carried into effect or not: That *R. J. Chippindall* had lately quitted *England*, and gone to reside abroad, and, in violation of the trust reposed in him, had, as *Yallop* had been informed, delivered up the Bills to *William Chippindall*, who was also residing abroad: That the Bills had all been negotiated by *Wm. Chippindall*, and that two of them, amounting to 100 *l.* and upwards, had been

lately presented for payment, and, being in the hands of *bonâ fide* holders, *Yallop* had been compelled to pay them, and was then threatened with legal proceedings for the recovery of the amount of another of them, if the same were not immediately paid : That, on the 3d of December 1827, he had received the following letter from *William Chippindall* :

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“ Dear Sir,

“ I have been waiting, now nearly a month, to hear from you on the subject of your Motion, on which his *Honor The Vice-Chancellor* took time to consider his Judgment, but not one line have I received from you, my only information arising from the report of the Motion in *The Courier Newspaper*. By the report in that Paper, it appears that your Counsel omitted to state that you had given Bills for part of the Consideration Money, and that you had paid the residue, being 100 *l.* : on the contrary, he stated that you had deposited Bills to abide the event. Now, this is not the fact. You know that you have accepted Bills to the amount of 900 *l.* drawn by me and payable to my order, being the residue after deducting the 100 *l.* paid me. These Bills were negotiated, early in July last, by me, and are now in the hands of Indorsees for valuable consideration ; and, let the decision be what it may, these Bills must be paid.

“ *Calais*, 30th Nov. 1827.”

That, from the period when this matter was previously discussed before the Court, up to the date of the above letter, he had not, directly or indirectly, held any communication, by letter or otherwise, with *William Chippindall*, upon the subject of the Annuity, or

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any matter connected therewith, or with the proceedings of the Plaintiffs; and that he was not in any manner acting in collusion with *William Chippindall*, or any other person connected with or acting for him, in any attempt to obtain an improper release of the Annuity, or to frustrate any claim or demand which the Plaintiffs might then have or could have had upon him.

Mr *Sugden* and Mr. *Cooper*, in support of the Motion:—

It is important to observe that this Sequestration did not issue to compel obedience to a Decree, but for want of an Answer. *Maynard v. Pomfret* (k), and the *Solicitor-General's* argument in *Simmonds v. Lord Kinnaird* (l). Mr. *Yallop*, though he appeared upon, and did not oppose the Motions on which the Orders now sought to be discharged were obtained, did not consent to them, and, therefore, he is not precluded from moving to discharge those Orders. It has been said that *Yallop* may repurchase the Annuity, but must pay the Purchase-money into Court. But what discharge can the Court give him? *Chippindall* may clear his contempt to-morrow; what would then be done with the Money? What is there to preclude *Yallop* from filing a Bill to set aside the Annuity on the ground of the fraudulent misrepresentation made by *Chippindall*, and which induced *Yallop* to grant the Annuity?

The Court did not seize the Annuity, because it had jurisdiction over it, but because *Yallop* had acquiesced in the Orders. As there is now an end of the

(k) 3 Atk. 468.

(l) 4 Ves. 738, 739.

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Annuity, there is an end of the Jurisdiction, which was given by the acquiescence; and, as the Court had, originally, no power to take the Annuity, it cannot seize the Money paid for the repurchase, because the Court never could have laid its hands upon that Money.

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Mr. *Horne*, Mr. *Wakefield* and Mr. *Lynch*, for the Plaintiffs:—

The Bills of Exchange were never intended to be circulated; for Mr. *Yallop* complains that they were negotiated in breach of the understanding between him and *Chippindall*. The Plaintiffs did not authorize *Chippindall's* Son to be the Depositary of the Bills, but he was chosen by *Yallop* for that purpose. When *Yallop* submitted to the Orders, he submitted himself to the Jurisdiction, and cannot now withdraw from it. *Coulston v. Gardiner (m)*. He did not apply to the Court for leave to redeem the Annuity: he ought to have asked for a reference to the *Master*, to ascertain on what terms he might redeem it. The Injunction granted to restrain *Chippindall* from suing *Yallop* for the Annuity, was an effectual release to him.

The VICE-CHANCELLOR:—

When this matter was last before me, I did, whilst endeavouring to ascertain what was the Law upon the general point, consider whether it would be competent to Mr. *Yallop*, who was the person bound to pay the *Chose in Action*, to receive a release from the Creditor

(m) 3 Swanst. 279, n.

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of the *Chose in Action*: and, inasmuch as, had it not been for the accidental circumstance of Mr. *Yallop* placing himself within the Jurisdiction of the Court, the Court would have had no Jurisdiction whatever over the Annuity, I thought that he could be considered as having subjected himself, to the Jurisdiction of the Court, so far only as, by his own acts, or, if I may use the expression, by his own intromissions in the proceedings regarding this Annuity, it might have happened that he had actually bound himself. It would, therefore, have been a violent thing to say, as the Annuity was then existing, and as Mr. *Yallop* was compellable to pay it if legal process was issued by Mr. *Chippindall*, that he should be prevented from taking a release of it from Mr. *Chippindall*, if that Gentleman, upon terms that satisfied himself, should think proper to give one; for, as against Mr. *Chippindall*, the Court had no Jurisdiction whatever over the Annuity, and it was only because Mr. *Yallop* had accidentally subjected himself to the Jurisdiction, that the Court possessed any authority at all over the Annuity. Mr. *Chippindall* was perfectly free to release the Annuity upon any terms. The question was, whether Mr. *Yallop* had, by his conduct, precluded himself from receiving the benefit of any act which Mr. *Chippindall* himself might, in his own discretion, do: and I was so fully satisfied, at that time, that Mr. *Yallop* was at liberty to take a release of the Annuity from Mr. *Chippindall*, that I had prepared myself to express that opinion; because, as I collected the facts from the Affidavit made on the 3d of August, I supposed that the Consideration for the Release had been paid. But, having been informed afterwards that the Release was not perfect, I was

induced to refrain from expressing the opinion which I had deliberately formed, and still entertain.

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By the Affidavit of the 3d of August it was stated, in a short manner, that the Release had been given, but it was not said that the Consideration had been paid. I cannot think that any fraud has been practised by Mr. *Yallop* in the transaction. He states the fact that the Release had been executed; and I think that, so far from there being any thing like an intention to practise a fraud on the Court, Mr. *Yallop's* conduct has been quite correct, and that he has brought the facts of the Case fairly before the Court.

When the Case was argued, it was supposed that, in point of fact, the Consideration for the Release of the Annuity had not passed from Mr. *Yallop* to Mr. *Chippindall*; therefore, any observations in respect of the Release were properly abstained from. It appears, on the Affidavit of Mr. *Yallop* last made (an Affidavit which, I understand, is not in any manner opposed), that, though he had made a Compromise which reduced the original Annuity from 500*l.* to 250*l.*, he had still reason to complain of the existence of the Annuity of 250*l.*; because that reduced Annuity was secured, by his Bond, upon the condition that Mr. *Chippindall* was to assist in carrying on the business. It appears, however, that, so far from Mr. *Chippindall* consenting to perform this part of the Agreement which related to the reduced Annuity of 250*l.*, he relieved himself from all attention to the business, and, in fact, went to *France*: and Mr. *Yallop's* Affidavit states what is consistent with all the Correspondence which appears on the Papers before me. It appears that there was a

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good deal of negotiation, at least I collect so from the Affidavit; and that the Bills of Exchange were deposited with Mr. *R. J. Chippindall*, and were afterwards handed over by him to Mr. *Wm. Chippindall*: and no one who reads his Letter can doubt that he has had as much benefit of the Bills as if they had been originally placed in his hands. It is observable, although Mr. *Yallop* does not state the fact, that he paid the additional sum of 90*l.*: and it appears, by that Letter of Mr. *Chippindall's* set forth in the Affidavit, that the Bills were negotiated by him, and that Mr. *Yallop* has actually paid some of them. So far from there being any thing like a Fraud upon the Plaintiffs, Mr. *Yallop* was endeavouring to extricate himself from a case of hardship in which he was placed by Mr. *Chippindall*; and he was only doing that which he was at perfect liberty to do. I think that, inasmuch as this was an act of Mr. *Chippindall's* which Mr. *Chippindall* was at liberty to do, and this was an acceptance of the act which Mr. *Yallop* was at liberty to give, the subject matter of the Orders of the 20th February and the 14th March ceased to exist; and that these Orders ought to be discharged.

With respect to the Cases that were referred to, they apply to legitimate subjects of Sequestration, over which this Court originally had Jurisdiction; but which, in this Case, it never had, and could not have had, but for the accidental circumstance I before alluded to. I would maintain the Principle of Lord *Hardwicke* as much as any one would; but that Principle is not in the least applicable to the present subject. I wanted some information about the sum of 90*l.*, and I find it supplied by Mr. *Chippindall's* Letter.

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Making an Order to discharge these Orders will not, in fact, interfere with the Order of the 16th January 1828.

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and others.

Motion to discharge the Orders of 20th February and 14th March, granted.

HORLOCK v. PRIESTLEY and WIFE.

1827 :
21st November.

*Priority of
Incumbrances.*

IN 1790, *Thomas Bennett*, being seised in fee of certain Copyhold Hereditaments, made a conditional Surrender of them, out of Court, to the Defendant, *Jane Priestley*, then *Jane Hulton*, spinster, in Fee, to secure the repayment of 1,000*l.* and Interest. At a Court held on the 10th of December 1792, the Homage presented this Surrender to the Steward for enrolment; but it was not then enrolled. In 1800, *Bennett* died; and, in 1808, his Son and customary Heir sold the Property to *Thomas Smith*, who was duly admitted to it on the 12th of December 1814. *Smith* covenanted to surrender the Copyhold Hereditaments to Trustees, upon certain Trusts for securing two Annuities which he had sold to the Plaintiff and one *Yems*, and, on the same day, surrendered the Premises accordingly. At the next Court, held on the 3d of May 1815, this Surrender was presented and enrolled; and the Trustees were admitted on the 28th of February 1824. At a Court held on the 19th of June 1820, the Surrender of the 10th of December 1792 was again presented; and, on the 15th of May 1823, the Defendants, *Priestley* and Wife, were admitted under it. *Horlock* and *Yems*, before they paid their

Where, by the Custom of a Manor, no time is limited for presenting Surrenders of Copyholds, an Incumbrancer whose Security has not been enrolled until long after a subsequent Incumbrance, will not be postponed, although the subsequent Incumbrancer had no notice of the prior Charge.

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Purchase-monies for the Annuities, searched the Court Rolls for Incumbrances, but found none. There was no definite time within which Surrenders were required to be presented. The Bill prayed, amongst other things, that the Surrender made in 1790 might be postponed to that of the 12th of December 1814, and that the Defendants, *Priestley* and Wife, might concur in a Sale of the Premises, under the Trusts upon which that Surrender was made. The Defendants, in their Answer, said that they did not disturb either the *Bennetts* or *Smith* in the possession or enjoyment of the Premises, because the Interest of their Mortgage-money was regularly paid up to August 1818, and they supposed that the Surrender had been duly enrolled according to the Presentment in 1792.

This Cause was heard in Hilary Term 1824, when the Court directed an Ejectment to be brought by the Defendants, in order to ascertain whether the legal Estate in the Premises was vested in them or not. At the trial of the Ejectment, a verdict was found for the Plaintiff at Law, subject to the opinion of the Court of King's Bench upon a Case; and the Court, after hearing the Case argued, ordered the Postea to be delivered to the Plaintiff (a).

Mr. Heald, Mr. Haslewood and Mr. Pennington,
for *Horlock* and *Yems*:—

All that the Court of Law has decided, is that Mr. and Mrs. *Priestley* have got the legal Estate in them; but the question is, whether this Court will not postpone their Security in consequence of their

(a) See the Report of this Case in 6 B. & C. 484.

negligence in not having their Surrender entered on the Court Rolls, whereby they enabled *Smith* to commit a fraud upon *Horlock* and *Yems*. Persons are not so much on their guard in advancing Money upon Copyhold Security, as they are in lending it on Freehold Security. The Court Rolls are the ordinary evidence of a Copyholder's Title; and, if a person who is going to lend Money on the security of a Copyhold Estate, searches the Rolls, and finds no Incumbrance entered on them, he is warranted in presuming that none exists. Mr. and Mrs. *Priestley* are the instruments by which an injury has been done to our Clients; why then are they to take advantage of their legal Estate in a Court of Equity? *Evans v. Bicknell* (b).

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HORLOCK
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and Wife.

Mr. *Sugden* and Mr. *Roupell*, for *Priestley* and Wife, were stopped by the Court.

Mr. *Agar* and Mr. *Seymour* appeared for the other Parties.

THE VICE-CHANCELLOR :—

The Surrender to Mrs. *Priestley* was made in the year 1790; and it is found, as a fact in this Case, that, by the Custom of this Manor, there is no limited time for presenting Surrenders made out of Court; therefore, those who dealt with the Tenant of this Estate, might inform themselves of the Custom. This Case has been put upon the doctrine laid down by Lord *Eldon*, C. in *Evans v. Bicknell*. But what is the fraudulent intention or concealment imputed to Mr. and Mrs. *Priestley*? They were not bound to have the Surrender presented, except when it suited their convenience; and, as the

(b) 6 Ves. 174. See also *Plumb v. Fluitt*, 2 Anstr. 432.

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Interest on their Mortgage was regularly paid, they might not think it necessary to take that precaution. They had an inchoate legal Title, which they might complete whenever they pleased; and, in this case, Equity must follow the Law; and it has been decided that they had priority at Law.

26th and 28th
 November.

WILLIAMS v. EDWARDS.

Vendor and Pur-
 chaser.
 Specific
 Performance.
 Costs.

One of the terms of an Agreement was that the Contract should be void if the Purchaser's Counsel should be of opinion that a marketable Title could not be made by a certain time. The Counsel being of that opinion, a Bill by the Purchaser for a Specific Performance, with a Compensation, was dismissed with Costs; and an application, afterwards made by the Plaintiff, that his Deposit might be set-off against the Defendant's Costs, and the surplus (if any) paid to him, was refused with Costs.

THE Defendant was the surviving Assignee of one *Abraham Stephens Racster*, a Bankrupt. In November 1824 he agreed to sell to the Plaintiff certain Real Estates, late the Property of the Bankrupt. The Articles of the Agreement were dated the 12th of November 1824, and were as follows:

"The said *John Edwards* doth agree to sell, and the said *Francis Williams* doth agree to purchase, at the sum of 3,305 *l.*, to be paid subject to the Agreement and as hereinafter mentioned, two undivided Third Parts or Shares absolutely, and the Life-interest of the said Bankrupt of in or to the remaining One-third Part or Share of and in all that Copyhold Messuage, or Tenement, Buildings, Farm and Lands, called or known by the name of *Cobhouse*, in the Parish of *Wickenford*, in the County of *Worcester*, and containing by admeasure-ment 86 A. 3 R. 30 P., little more or less; and also of and in the Two-third Parts or Shares in Fee-simple,

and the Life-interest of the said Bankrupt of and in the remaining One-third Part or Share of and in all those Freehold Tenements and Blacksmith's shop, and pieces or parcels of Land, containing together 19 A. 3 R. 32 P., little more or less, called *Boxleys*, also situate in the said Parish of *Wickenford*. The said *John Edwards* engages that the said Copyhold Premises are full lived, and to furnish, within one calendar month from the date hereof, a satisfactory Abstract of a marketable Title to the said Premises; and, upon receiving the Purchase-money on or before the 2d day of February then next ensuing, will execute, and cause all proper Parties to join in and execute proper Conveyances of the said Copyhold and Freehold Premises, and to surrender the said Copyhold Premises unto the said *Francis Williams* and his Heirs, or as he shall direct, free from Incumbrances, except Land Tax, Chief Rent, and the Rents, Suits and Services due and payable for the said Copyhold Premises; and, on the execution of which Conveyances and Surrenders as aforesaid, the said *Francis Williams* will pay, unto the said *John Edwards* and the Parties entitled thereto, the said Purchase-money of 3,305*l.*, subject as after-mentioned; and shall thereupon be entitled to the Rents and Profits of the said Premises from the said 2d day of February, up to which time all outgoings shall be paid by the said *John Edwards*. Errors in the description of the Premises shall not vacate this Agreement, but a reasonable abatement or equivalent be made or given, as the case may require. The said *Francis Williams* shall pay the expense of his own Conveyances, and the fines and the fees for his admission to the said Copyhold Premises; but the said *John Edwards* is to be at the expense of surrendering the same. If the Surrender and Conveyance of the Pre-

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mises be not perfected on the said 2d day of February, the said *Francis Williams* shall pay Interest for his Purchase-money, after the rate of 4*l.* per Cent per Annum, from the time of his being entitled to the Rents and Profits. If the Counsel of the said *Francis Williams* shall be of opinion that a marketable Title cannot be made by the time hereby appointed for the completion of the said Purchase, this Agreement shall be void and delivered up to be cancelled. This Agreement shall not be affected by any accidental damage which may happen to the said Premises, between the date hereof and the time limited for the completion of the Purchase; but the benefit of any then subsisting Policy of Insurance shall, in such case, belong to the said *Francis Williams*. The said *John Edwards* will not from henceforth grant or contract for any Leases of the said Premises without the consent in writing of the said *Francis Williams*. The delivery and production of Title Deeds, and the expenses of Conveyances, and of attested Copies, should be made and paid by the respective Parties, according to the established practice in similar Cases."

Shortly after the execution of these Articles, the Plaintiff paid to the Defendant a deposit of 100*l.* in part of the Purchase-money. The Abstract of the Defendant's Title having been submitted to Counsel, the Plaintiff was advised that the Defendant could make out a good Title to the Fee-simple of Two-thirds only of the Freehold part of the Property, and that he was seised of the remaining Third, and the whole of the Copyhold part, for the Life of the Bankrupt only. The Bill prayed for a specific performance of the Agreement; and that, if it should appear that the Defendant had

power to convey part of the Property to the Plaintiff, for the Life of the Bankrupt only, he might be decreed to convey the same accordingly; and that an abatement might be made, to the Plaintiff, out of his Purchase-money. The Defendant, in his Answer, admitted that his Title was defective as before mentioned; and submitted that, under the Agreement, he was not bound to make, to the Plaintiff, any allowance out of the Purchase-money in respect of the defect, and that the Agreement was, under the circumstances, void and ought to be delivered up to be cancelled pursuant to the terms thereof.

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Mr. *Heald* and Mr. *Girdlestone*, for the Plaintiff, contended that the Defendant was bound to perform the Agreement as far as he was able, and to make an allowance, to the Plaintiff, in respect of his deficiency of Interest in Two-thirds of the Copyhold Premises: and they cited *Mortlock v. Buller (a)*, and *Wood v. Griffith (b)*.

Mr. *Treslove* and Mr. *Stinton*, for the Defendant, cited *Hudson v. Bartram (c)*, and said that it was one of the terms of the Agreement that, if the Counsel of the Defendant should be of opinion that a marketable Title could not be made to the Property, by the time appointed for the completion of the Purchase, the Agreement should be void; that time was here made of the essence of the Contract; that the Purchaser's Counsel was of opinion that a marketable Title could not be made, and that, therefore, the Vendor was entitled

(a) 10 Ves. 292. See pp. 315, 316.

(b) 1 Swans. 43. (c) 3 Madd. 440.

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to say that the Contract was at an end ; and that there was no Evidence to show that the Vendor had waived the benefit of the stipulation.

The VICE-CHANCELLOR :—

In this Case I wished to consider the terms of the Agreement before I came to any decision on the subject.

It appears to me that the doctrine relied on by the Plaintiff's Counsel, is not directly applicable to the Case in question ; because the position which my Lord *Eldon* lays down in the Case of *Mortlock v. Buller*, is a position adopted in a variety of cases, and is a position applicable to all Contracts of a general nature, where the Parties themselves have not entered into a specific Agreement as to some event or other which should determine the Contract. Now, in this Case, the Parties have expressly stipulated, in the first place, that Errors in the description of the Premises should not vacate the Agreement, but that a reasonable Abatement or Equivalent should be given or taken, as the case may require : and then they stipulate that, if the Counsel of *Francis Williams*, who was to be the Purchaser, should be of opinion that a marketable Title could not be made by the time appointed for the completion of the Purchase, the Agreement should be void, and delivered up to be cancelled.

The Agreement was made on the 12th November 1824 ; and this particular Clause in the Agreement I must take to be the Contract both of the Vendor and the Purchaser. They might both think that it would be equally to their interest that the Agreement should

be put an end to, if the Counsel of the Purchaser should be of opinion that a marketable Title could not be made. There appears to be nothing unreasonable in that. There might be circumstances which might make it very proper for both Parties to insert that term; and, as it was the Contract of both the Parties, this Court cannot make a new Contract for them. The Parties themselves have stipulated that, in a given event, which happened, the Agreement should be void. It appears to me, therefore, that the Bill must be dismissed; and the only question is, whether it is to be dismissed with Costs or not.

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I find, with respect to that question, the Parties have chosen to make an Agreement in an unusual form, having regard to a probable Contingency, which they both contemplated at the time; and the Purchaser has himself stipulated that, if the event took place, the Agreement should be void; and he now brings forward a Case in which he says the Agreement is not void. My opinion is that, if Parties make a Contract in this very specific manner, the Court, which is to compel the specific performance of the Contract between the Parties, is bound by the terms of the Agreement between them; and, therefore, the Purchaser is asking to enforce an Agreement which he has himself agreed should, under certain circumstances, be void; and that, therefore, the Bill must be dismissed with Costs.

On this day an application was made, to the Court, in this Cause, on behalf of the Plaintiff, that the sum of 100*l.* with Interest at 5*l.* per Cent, the Deposit paid, by the Plaintiff to the Defendant, on signing the

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16th January.

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Agreement, might be set-off against the Defendant's Costs; and, if the Deposit and Interest should exceed the amount of those Costs, that the Surplus might be paid to the Plaintiff out of the Bankrupt's Estate.

Mr. *Girdlestone*, in support of the Application, said that it was not adverted to, at the hearing of the Cause, that the Purchaser had paid part of the Purchase-money.

Mr. *Treslove* and Mr. *Stinton*, for the Defendant, said that, if the Application was granted, the Solicitor would be deprived of his Lien for the Costs, and cited *Ex parte Bryant* (d); *Wright v. Mudie* (e); *Smith v. Brocklesby* (f); *Bennet College v. Carey* (g); and *Randle v. Fuller* (h).

Mr. *Girdlestone*, in reply, said that the Cases referred to did not apply, as they were Cases in which it was attempted to set-off one set of Costs against another; that no attempt was made to deprive the Solicitor of his Lien; and that here the Deposit had been paid to the Defendant, not in his own right, but as Assignee of the Bankrupt.

The VICE-CHANCELLOR :—

I have no jurisdiction to grant this Application. The Case last cited is quite decisive upon the point. When the Bill is dismissed, then arises the legal right to recover the Deposit.

Motion refused with Costs.

(d) 1 Madd. 49.

(e) 1 Sim. & Stu. 266.

(f) 1 Anst. 61.

(g) 3 Bro. C.C. 390.

(h) 6 T. R. 456.

HOME v. WATSON.

THE Plaintiff had obtained the common Injunction, as of course. He then got an Order to amend his Bill without saying the Injunction; and afterwards obtained the common Injunction, as of course, upon the amended Bill. The Defendant now moved to discharge the Order for the second Injunction, for irregularity. The irregularity complained of, was that the second Injunction had been obtained upon a Motion of Course, and not by a special Application.

Mr. Horne and Mr. Wakefield, for the Defendant, cited *Norris v. Kennedy* (a); *James v. Downes* (b); and *Vipan v. Mortlock* (c).

Mr. Pepys and Mr. Garratt, for the Plaintiff, said that, in all the Cases that had been cited, the Injunction had issued on merits: that, in this Case, the Court had never exercised its judgment upon the merits, and the Injunction had been lost by Amendment: and they referred to *Travers v. Lord Stafford* (d); *Anon.* (e); *Nelthorpe v. Law* (f); and *Statham v. Hughes* (g).

1827:
4th and 5th
December.

Practice.
Injunction.

A Plaintiff who had obtained the common Injunction, as of course, procured an Order to amend, and then obtained an Injunction upon the amended Bill as of Course: Held that a special Application ought to have been made.

The VICE-CHANCELLOR:—

Where a Party, having obtained an Injunction, moves to amend his Bill without saying the Injunction, the Injunction is dissolved; and, if he wishes to obtain an Injunction upon the amended Bill, he must, in ordinary

(a) 11 Ves. 565.

(b) 18 Ves. 522.

(c) 2 Mer. 476.

(d) 2 Vez. 19.

(e) 3 Atk. 694.

(f) 13 Ves. 323.

(g) 2 Sim. & Stu. 382.

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v.

WATSON.

Cases, make a special Application for it; and the circumstances of this Case do not appear to me to afford any reason for deviating from the usual practice. Indeed the Case here is stronger against the Plaintiff; for his amendment of the Bill dissolved the Injunction. But if there is any doubt, I will desire The *Registrar* to inquire into the practice.

The VICE-CHANCELLOR:—

5th December.

I desired The *Registrar* to inquire into the practice. He could not find any Authority expressly upon the Case, but referred me to *Edwards v. Edwards (h)*. There the Injunction was dissolved upon the merits; but the reasons and observations seem to throw some light upon the subject. The *Registrar (i)*, applying his view to the case where the Injunction is lost by amendment, as well as where it is dissolved upon merits, says: "This however doth not preclude a Plaintiff from applying to revive the Injunction on amending his Bill." Therefore, it was the opinion of The *Registrar* that, in either case, it was necessary to apply specially. The case of *Mason v. Murray (k)* also applies to the subject. And, in *The Practical Register*, it is laid down that an Injunction cannot be granted upon a *dedimus* to take an Answer to an amended Bill; but if, on the coming in of the Answer to the amended Bill, sufficient grounds are disclosed, the Plaintiff may move for an Injunction on the merits. I therefore am confirmed in the opinion, which I expressed yesterday, that the second Injunction has been obtained irregularly.

Motion granted.

(A) 2 Dick. 755.

(i) Mr. Dickens.

(k) 2 Dick. 536.

COLLINS v. MACPHERSON.

1827 :
11th December.

Will.
Construction.

WILLIAM TYLER by his Will, after devising certain Freehold Estates, and giving several specific and pecuniary Legacies, disposed of the residue of his Personal Estate as follows :

“ And as to all the rest, residue and remainder of my Personal Estate and Effects, whatsoever, I give and bequeath the same unto *James Collins* and *William Sims*, upon Trust that they shall, as soon as conveniently may be after my decease, set apart and lay out, in their Names, such sum of Money, arising from such residue, as will purchase a sufficient Sum, in some or one of the Public Stocks or Funds, to produce an Income of 200 *l.* per Annum ; and that they shall stand possessed of such Stocks or Funds, when so purchased and set apart, and of all the Dividends or Interest to arise thereon, in Trust to pay such Dividends or Interest unto my Wife *Sarah Tyler*, during her Life ; and, from and immediately after the decease of her my said Wife, I do hereby direct and declare that they, my said Trustees for the time being, shall stand possessed of and interested in the said Stocks or Funds so to be purchased by them as aforesaid, in Trust thereout to transfer, unto my Son *John Tyler*, so much thereof as will produce the sum of 1,000 *l.*, to be received by him in lieu of payment for all Sugars he may have supplied me and my Family with during my Life : but, if my

Testator directed his Executors to Purchase, out of his Residuary Estate, a certain sum of Stock, and to pay the Dividends to his Wife for her Life, and after her death to divide the Capital between such of his three Daughters as should be then living : Provided that, if any one of them should be then dead, or should afterwards die before her Share should become payable or divisible, leaving a Child or Children, that Share should go to such Child or Children. The Testator's Wife died in his lifetime. One of the Daughters died three Months after the Testator :

Held, nevertheless, that she had a vested Interest in one of the Shares.

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said Son shall call for and obtain payment for all or any part of such Sugars, then I direct that he shall only be paid such further sum as will make up the said 1,000*l.*, and he shall not, in that case, be entitled to any further sum of Money as a Legacy under this my Will (save and except the before-mentioned 50*l.*, and the proportionate Share of the residue of my Estate hereinafter bequeathed to him), and that the residue of the said 1,000*l.*, in such last-mentioned case, shall go into the general residue of my Personal Estate : and, as to the remainder of the Stocks or Funds so to be purchased by my said Trustees as aforesaid, after deducting the above-mentioned Legacy of 1,000*l.* to my said Son *John Tyler*, upon Trust that they the said *James Collins* and *William Sims* do and shall, as soon as conveniently may be after the decease of my said Wife, pay and divide the same equally between and amongst my Daughters *Henrietta Newham*, *Anne Macpherson*, and *Sophia Huddleston*, or between and amongst such of them as shall be then living, but subject to the Proviso next hereinafter contained, (that is to say) Provided, always, that, if either of them my said Daughters *Henrietta*, *Anne*, or *Sophia*, shall, at the decease of my said Wife, be dead, or shall afterwards die before her one-third Share of the said last-mentioned Money or Stock shall become payable or divisible, leaving a Child or Children, then my Will and Mind is that such last-mentioned Child or Children, if more than one, shall take and be entitled to have the original Share of their Parent between and amongst them, and which last-mentioned Share shall, in such last-mentioned case, become payable or transferable to him, her or them, if more than one, in equal Shares, with all intermediate

accumulations thereon, on such of them as shall be Sons attaining the age of twenty-one years; and on such of them as shall be Daughters attaining that age or being married, which shall first happen, and with benefit of Survivorship between such last-mentioned Child or Children in the mean time; and, if there shall be only one such Child, then that such only Child shall take and be entitled to his or her Parent's one-third Share of such last-mentioned sum of Money or Stock, payable at the time and in the manner aforesaid: but, if either of them my said Daughters *Henrietta, Anne, and Sophia*, shall, at the decease of my said Wife, be dead, or shall afterwards die before her Share of the said Money or Stock shall become payable or divisible, without leaving a Child or Children, or leaving such, and they shall all die without attaining the age of twenty-one years, or otherwise acquiring a vested Interest in such Share of the said Trust Monies, then that such last-mentioned Share shall go and be divided between and amongst my said other Children and Children's Children as hereinbefore mentioned. And I direct and declare that neither of my Daughters hereinbefore mentioned shall have any disposing Power, by way of Anticipation, Sale, Mortgage, Assignment or otherwise, in or over any of the Legacies or Bequests hereinbefore or hereinafter by me given or bequeathed to them respectively. [Here was inserted a Declaration that the Receipts of the Daughters, notwithstanding their Coverture or any Disposition they might make of their Legacies, should be the only sufficient Discharges to the Trustees]. And I further declare, that no part or parts of such respective Legacies or Bequests shall be subject or liable to the Control, Debts or Engagements

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of any Husband or Husbands they my said Daughters have married, or may hereafter marry, nor shall any part or parts of such respective Legacies or Bequests pass by any Mortgage, Assignment or Transfer, made or to be made by such Husband or Husbands. And my Will and Mind further is, that they the said *James Collins* and *William Sims*, or the Survivor of them, or the Executors or Administrators of such Survivor, shall and do, after paying the aforesaid Legacies, and setting apart the aforesaid several sums of Money, as soon as conveniently may be after the decease of my said Wife, divide the Money arising from the sale of my Real Estate, and the Residue of my said Personal Estate, into five equal Parts or Shares, and pay and apply one of such Shares unto each of my said Children, *Henrietta Newham*, *Anne Macpherson*, *Sophia Huddleston*, *John Tyler*, and my Grand-daughter, *Charlotte Bennett*, to and for his, her and their respective absolute use and benefit; but, in case any or either of my last-named Children, or my said Grandchild, shall die, in my lifetime, or without acquiring a vested Interest in the division of the said last-named residue, then my Will and Mind is that the Share or Shares of him or her so dying shall go and be divided in such and the same manner as is hereinbefore mentioned and expressed concerning the residue of the Money to arise from the sale of the Stocks or Funds which I have hereinbefore directed to be purchased for securing to my said Wife an Annuity of 200*l.* or as near thereto as parties and circumstances would admit."

And the Testator authorized his Trustees to apply the Income of all or any of the Funds appro-

priated under the Trusts of his Will, for the benefit of his Children who might be Infants, or for the Child or Children of such of them as should die leaving a Child or Children surviving who should not have attained the age of twenty-one years, or have otherwise acquired a vested Interest in such Trust Funds, and that the surplus Income should be laid out and accumulated for the benefit of the Persons entitled to the Principal: and the Testator appointed his Wife and the Plaintiffs Executrix and Executors of his Will.

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The Testator's Wife died in her Husband's lifetime; and, on the 11th of February 1824, the Testator died, leaving *Anne Macpherson*, *Henrietta*, the Wife of *John Newham*, and *Sophia*, the Wife of *Gent Huddleston*, surviving him. *Anne Macpherson* died on the 28th of May 1824, which was about three Months after the Testator. She left three infant Children, one of whom died before the Suit was commenced.

The Bill was filed by the two surviving Executors; and, after stating the facts before mentioned, it alleged that *Mrs. Macpherson* died before her Share or Interest under the Testator's Will had been paid or secured to her: that, on the 11th of February 1825, being one Year from the Testator's Death, and the time at which the Plaintiffs were advised that the Legacies given by the Will ought to have been paid, the Fund required to purchase an Annuity of 200 *l.* in the three per Cent Consols, was 6,250 *l.*, but the Assets of the Testator were sufficient to pay 5,620 *l.* only; and accordingly the Plaintiffs, after deducting therefrom the Legacy of 1,000 *l.* given to *John Tyler*, divided the remaining

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4,620*l.* into three parts, and paid one third part to Mrs. *Newham*, another third part to Mrs. *Huddleston*, and invested the remaining one third in the purchase of 1,623*l.* 5*s.* 3*d.* three per Cent Consols, subject to the Trusts to which the same was applicable; that *Philip Macpherson* alleged that his Wife, having survived the Testator, acquired a vested Interest in the Property bequeathed to her, and that he, as her Administrator, was entitled to the 1,623*l.* 5*s.* 3*d.* three per Cent. Consols, notwithstanding she died before her Share was paid to her; whereas her Children, and her Sisters and their Husbands, alleged that she, having died before her Share became payable to her, never acquired a vested Interest therein, but that it belonged to her Children; and, in case they should all die under twenty-one, that it would belong to Mrs. *Newham* and Mrs. *Huddleston*. The Bill prayed that the Rights and Interests of the Defendants to and in the 1,623*l.* 5*s.* 3*d.* three per Cents, might be ascertained and declared by the Court.

Mr. *Pemberton*, for the Plaintiffs.

Mr. *Ching*, for Mr. and Mrs. *Newham*.

Mr. *Heuld* and Mr. *Roots*, for Mr. *Macpherson*:—

The question which arises upon the Proviso in this Will, is whether Mrs. *Macpherson* was entitled to this Sum at the time when she died, or whether her Children have become entitled to it. It seems absurd to say that, because the Trustees neglected to sell out the Stock, the Property is to go to the Children. The Testator, in a subsequent part of his Will, says: "But in case any

or either of my said last-named Children, or my said Grand-child, shall die in my lifetime," &c. It seems, therefore, that the Testator contemplated the possibility of his Children dying in his lifetime; and the only rational construction that can be put upon the words "payable and divisible" in this Proviso, is to hold that the Testator intended, when he used them, to provide for the same event.

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Mr. Collinson, for the Children of Mr. and Mrs. Macpherson :—

The period at which Mrs. Macpherson would have become entitled to her Share of the Stock directed to be purchased, had not arrived when that Lady died. The Property which the Testator directed to be invested in the Funds, was part of his Residuary Estate. At what period was it payable and divisible? Not until twelve months after the death of the Testator. If this construction is not adopted, the Court will either be under the necessity of striking out some of the words of the Will; or must say that the Testator, when he speaks of his Wife's death, meant his own. What he meant was, that Mrs. Macpherson should have her Share, in case she was alive when the period arrived at which the Fund would, by the rules of this Court, be divisible. By "payable and divisible" the Testator meant "paid and divided;" and that, if his Daughters received the Money, they were to keep it, but if not, that it was to be paid to their Children. Besides, the Testator has used words expressly to exclude the Husbands from taking.

Mr. Crombie, for Mr. and Mrs. Huddleston.

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The *Vice-Chancellor*, in the course of the Argument, asked when Mrs. *Macpherson's* Share would have become payable, supposing she had lived five years after the Testator; and, at the conclusion of it, said that, though it was not very clear, yet taking the whole of the Will together, he was of opinion that Mrs. *Macpherson* became entitled, at the death of the Testator, to a Share of the Stock directed to be purchased.

HOUGHAM v. SANDYS.

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14th, 15th, 17th,
and 28th
December.

BY Indentures of Lease and Release, dated the 1st and 2d of May 1760, the Release being made between *Ann Pyott*, Spinster, the only Child of *Charles Pyott*, thereinafter named, by *Ann* his late Wife, deceased, who was one of the three surviving Daughters and Co-heirs

Appointment.
Conversion. Wil.
Construction.

By Mr. and
Mrs. P.'s Mar-

riage Settlement, Estates in *Kent* and other Counties, the Lady's property, were settled on her for life, Remainder to Mr. P. for life, if she should so appoint, Remainder to their Children, Remainder as Mrs. P., by Deed under her hand and seal, attested, &c., or by her Will, signed and published in the presence of three Witnesses, should appoint; Remainder to Mrs. P. in Fee, with a power of Sale, and directions for re-investing the proceeds in other Estates, and, in the usual Securities, in the interim, and that, upon the Re-investment, the uses of the Settlement should cease as to the sold Estates. Mrs. P., by Deed not attested as to her signature, (at the foot of which she had written, without date, directions for her Burial), appointed the Estates, after her decease, to her Husband for life, and, in default of Children, to him in Fee; and she revoked a prior Deed of Appointment. The Estates were afterwards sold, and the proceeds invested in Securities, but were never re-invested in Lands, although their liability to be so was recognised by the Parties. There was no Issue of the Marriage. Mrs. P. survived her Husband, and applied part of the proceeds to her own use. At her death, she was seised (exclusive of the settled Property) of a Mansion-house, with Outbuildings, Gardens, and a small Field adjoining it, and some Cottages opposite to it, let to Tenants, and was possessed of some Personal Estate, no part of which was in the name of a Trustee. She devised the Mansion-house, with its Appurtenances, and all other her Real Estates, to C. S., and bequeathed all her Personal Estate, whether in the name of herself or of any Trustee, subject expressly to her Debts and Legacies, to other Persons. After her death, the Deed of Appointment was found, in her house, with the Title-deeds of the Mansion-house; but the revoked Deed could not be found. Her Debts and Legacies greatly exceeded her Assets. Held that the former Deed was not a Testamentary Instrument, and that Mrs. P.'s receiving part of the proceeds of the settled Estates, was not an Entry or Claim within the 54 G. 3, c. 168, but that that Statute remedied the defect of Attestation: that the remaining proceeds remained as Real Estate, but did not pass either to the Devisee or the Residuary Legatees in the Will: that Mr. P.'s Co-heirs in Gavelkind were not entitled to any part, but that the whole belonged to his Heir at Law, under the Appointment.

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of Sir *Richard Sandys*, Baronet, deceased, of the first part, the said *Charles Pyott*, of the second part, *Robert Thomas Pyott*, Esquire, of the third part, and *John Knowler*, Esquire, and *Peter Johnson*, Esquire, of the fourth part, and by a Fine levied in the 33 Geo. 2, being the Settlement on the Marriage of *Ann Pyott* and *Robert Thomas Pyott*, (who were related to each other before their Intermarriage), one undivided third part of several Closes, Tenements and Hereditaments, being part of a Farm called *Bishop's Lathers*, otherwise *Bishop's Fields*, situate in the Parish of *Bishop's Hill Younger*, otherwise *Bishop's Hill Newer*, in the County of the City of *York*, and also of a capital Messuage or Mansion-house, situate in the Parish of *Northborne*, in the County of *Kent*, with the Lands and Grounds thereto belonging; and also of a Messuage and Farm, called *Northborne Court Lodge*, situate in the Parishes of *Northborne* and *Shoulden*, or one of them, in *Kent*; and also of a Messuage and Farm, called *Longdane Farm*, situate in the Parish of *Northborne* aforesaid, and also of a Messuage or Tenement and Farm, called *Cold Harbour*, situate in the Parishes of *Northborne* and *Shoulden* aforesaid, or one of them; and also of those three Closes, called *Ripple Closes* and *Sutton Close*, situate in the Parishes of *Ripple* and *Sutton*, or one of them, in *Kent*; and also of a Messuage or Tenement and Farm, called *Stoneheap Farm*, in the Parishes of *Northborne* aforesaid, and *Tillmanstone*, or one of them, in *Kent*; and also of the Tithes of Corn and Grain of certain Lands, called the *Lord's Lands*, and other Lands of *Thomas Stone* of *Deal*; and also of that Messuage or Tenement, called *Drove*, with the Orchard belonging to it; and of and in all other the Messuages, Farms, Lands, Tithes, Tenements

and Hereditaments whatsoever of *Ann Pyott* and *Charles Pyott*, or either of them, situate in the said Parishes, or elsewhere, in *Kent*; and all other the Manors, Messuages, Lands, Tenements and Hereditaments whatsoever of the said *Ann Pyott*, in the same County, in the County of the City of *York*, and in the Counties of *Somerset* and *Salop*, or elsewhere in *Great Britain*, with their Appurtenances, were conveyed, limited and assured unto and to the use of the said *John Knowler* and *Peter Johnson*, in Fee, upon Trust, after the solemnization of the Marriage, to pay, during the Life of *Ann Pyott*, the Rents and Profits thereof to *Ann Pyott*, for her separate use; and in case she, by any Deed or Deeds, Writing or Writings under her hand and seal, attested by two or more credible Witnesses, or by her last Will and Testament in writing, to be signed, published and declared as therein mentioned, should direct and appoint the Rents and Profits of the Premises to be paid, after her decease, to *Robert Thomas Pyott* for his Life, then upon Trust to pay the Rents and Profits of the Premises unto *Robert Thomas Pyott* during his Life; and, after the Death of *Robert Thomas Pyott*, in case of such Direction or Appointment to him, or, in default thereof, then after the death of *Ann Pyott*, upon Trust to stand seised of the Premises in Trust for all the Children of *Robert Thomas Pyott* on the body of *Ann Pyott* to be begotten, for such Estate and Estates, &c. as *Ann Pyott* and *Robert Thomas Pyott* should, jointly, during their joint Lives, or as the Survivor of them should, in manner therein mentioned, appoint; and, in default of such Appointment, in Trust for all their Children, in equal Shares, as Tenants in Common in Tail, with Cross-remainders between or amongst them in Tail, with Remainder in Trust for such Person and Persons,

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for such Estate and Estates, in such Parts and Proportions, and charged and chargeable with such Rents, Annuities, sum or sums of Money, payable either annually or otherwise, and in such Manner and Form, with or without Power of Revocation, as *Ann Pyott* should, from time to time, notwithstanding her Coverture, and whether she should be sole or married, by any Writing or Writings under her hand and seal, attested by two or more credible Witnesses, or by her last Will and Testament, or by any Writing purporting to be her last Will and Testament, to be by her signed and published in the presence of three or more credible Witnesses, appoint; and, in default of such Appointment, in Trust for *Ann Pyott*, in fee.

By the Indenture of Release it was declared that it should be lawful for Mr. and Mrs. *Pyott*, at any time or times during their joint Lives, and, in case Mrs. *Pyott* should survive Mr. *Pyott*, for her, at any time or times during her Life, with the consent and approbation of the Trustees or Trustee for the time being, to sell all or any part of the said undivided Third Part, and other Parts and Shares of the said Messuages, Lands, Tenements and Hereditaments, in the County of *Kent*, and in the County of the City of *York*, and all or any part of the Premises in the said Counties of *Somerset* and *Salop*, or elsewhere in *Great Britain*, or, otherwise, to make any exchange or exchanges of all or any part of the said undivided Third Part, and other Parts and Shares, and other the Premises, with any Person or Persons, for any other Freehold Lands, Tenements and Hereditaments of Inheritance, or, otherwise, to make a Partition or Division of all or any part of the said Messuages, Lands, Tenements and Hereditaments, so always that the Monies arising by such

Sale of all or any part of the said undivided Third Part, and other Parts and Shares, and of other the Premises, should be laid out in the purchase of other Lands, Tenements and Hereditaments being Freehold of Inheritance; and the Lands, Tenements and Hereditaments so to be purchased, or the Lands, Tenements and Hereditaments to be taken in exchange, or the Lands, Tenements and Hereditaments, upon such Partition or Division, to be allotted for and in lieu of all or any part of the same undivided Third Part, and other Parts, Shares and Premises, should, thereupon, be conveyed, assured and settled to and for the same, or the like Uses, Intents and Purposes, and upon the same or the like Trusts, and under and subject to the same or the like Agreements, as the said undivided Third Part, and other the Premises thereby granted and released, were thereby conveyed and limited, or as near the same as the then circumstances of the case would admit; and that, *then, and in such case*, all and every the Estates, Uses, Trusts and Agreements thereinbefore conveyed, limited, declared and mentioned, of and concerning the Premises, or such part thereof which should be so sold or given in exchange, or of which such Partition or Division should be made, should cease, determine, and be utterly void to all intents and purposes whatsoever.

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By a Deed-poll, bearing date the 14th of April 1761, under the hand and seal of *Ann Pyott*, and executed by her in the presence of three Witnesses, she, by virtue of the Power and Authority to her reserved by the Settlement, appointed the Rents and clear yearly Profits of all the settled Premises, from and immediately after her death, in case she should leave any Children or Child by her Husband *Robert Thomas Pyott* living at the

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time of her death, unto her said Husband for his life, and, after his decease, she directed and appointed the said Premises unto the Child or Children which she should leave by him living at the time of her death, in fee; but, if she should leave no such Child, then, from and immediately after her death, she appointed the same Premises unto and to the use of her said Husband, in fee; and she thereby revoked a certain Deed-poll, bearing date the 20th June then last, purporting to be an Appointment by her of the same Premises to other uses. And the Deed-poll of April 1761 also contained a proviso that it should be lawful for *Ann Pyott*, at any time or times thereafter, notwithstanding her Coverture, by any Writing under her hand and seal, or by her last Will and Testament, to be by her signed, sealed and executed in the presence of three or more credible Witnesses, to revoke the same Deed-poll; and, by the same or any other Writing or Writings, to be by her signed, sealed and attested as aforesaid, to appoint any new Uses of or concerning the same Premises, with like Power of Revocation to be therein contained, and so, from time to time, as often as she should think fit.

John Knowler, one of the Trustees of the Settlement, died in July 1763, leaving *Peter Johnson* his Co-trustee him surviving; and, in or about the year 1773, Mr. and Mrs. *Pyott*, with the consent of *Peter Johnson*, sold their Shares of the Premises situate in the Counties of *Somerset* and *Salop*, to *Richard Sandys*, Esquire, for 1,100*l.*: and, in the Conveyance thereof, was a recital that it had been agreed, between the Parties thereto, that the 1,100*l.* should be laid out and invested in some of the Public Funds, until a suitable and con-

venient purchase, of Lands and Hereditaments in fee simple, could be had, wherein to invest the same, pursuant to the proviso and direction in the Settlement in that behalf contained; and that, in the meantime, the Interest and Dividends of the Stock to be purchased therewith, should be paid and applied for the benefit of such Person and Persons, and for such intents and purposes, as the Rents and Profits of the Hereditaments so directed to be purchased, would be applicable, in case the same were actually so purchased and settled according to the directions of the Settlement.

In pursuance of this Agreement, the 1,100*l.* was laid out in the purchase of 1,307*l.* 11*s.* 6*d.* New South Sea Annuities, in the name of *Peter Johnson*.

In or about the years 1795 and 1796, Mr. and Mrs. *Pyott*, with the consent of *Peter Johnson*, sold the Third Part of the Premises in *Kent* and the County of the City of *York*, except *Stoneheap Farm*, and the Tithes before mentioned, to different Persons, for sums of Money amounting to 14,206*l.* 13*s.* 4*d.*; and, in the Conveyances thereof to the Purchasers (except only in the Conveyance to the Purchaser of the Site of *Northborne Court* and *Longdane Farm*,) it was recited that it was proposed, amongst the Parties to such Deeds, that the Purchase monies for the Estates respectively thereby conveyed, should be laid out and invested in some of the Public Funds, or on Mortgages of Freehold Estates of Inheritance in fee simple, of sufficient value, free from Incumbrances, in *Johnson's* name, until a suitable and convenient purchase, of Lands and Hereditaments in fee simple, could be had wherein to invest the same, pursuant to the proviso contained in the Settlement; and

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that, in the meantime, the Dividends and Interest of the Stocks or Securities on which the same should be invested, should be paid and applied to and for the benefit of such Person and Persons, and for such intents and purposes, as the Rents and Profits of the Hereditaments, so directed to be purchased, would be applicable, in case the same were so actually purchased and settled, according to the direction of the Settlement. And, in the Conveyances of the *York Estate*, *Johnson* covenanted with the Purchasers thereof to apply the Purchase-money upon the Trusts declared, by the Settlement, of the Purchase-monies to arise from the sale of the Hereditaments and Premises therein mentioned.

The 14,206*l.* 13*s.* 4*d.* were disposed of in the portions and manner following:—3,333*l.* 6*s.* 8*d.* were, in or about the year 1795, laid out in the purchase of the other two-thirds of *Stoneheap Farm*, and of the Tithes before mentioned; and those two-thirds were conveyed to *Johnson* in Fee, upon the Trusts of the Settlement: 8,900*l.* were, on the 26th December 1795, advanced to *Thomas Tireman* and *Ann* his Wife, and *George Ellin* and *Mary* his Wife, upon mortgage of the Entirety of the before-mentioned Hereditaments in the County of the City of *York*, in *Johnson's* name: 1,000*l.* were, on the 6th April 1795, advanced to *Henry Godfrey Faussett*, upon mortgage of Hereditaments in the Parishes of *Nether* and *Upper Hardres*, or one of them, in *Kent*, in *Johnson's* name: 303*l.* 13*s.* 6½*d.* were applied in payment of the Costs and Expenses attending the Sales: 333*l.* 6*s.* 8*d.* were applied in paying off a proportion of a Mortgage of 1,500*l.* on the Entirety of the said Estates, to the Representative of *Charles Pyott*, the Father of *Mrs. Pyott*: and 336*l.* 6*s.* 5½*d.* were

applied, with other Monies belonging to Mr. and Mrs. *Pyott*, in lending 500*l.* to *Sarah Nott*, on her note.

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By an Indenture, dated the 14th of January 1796, and made between Mr. and Mrs. *Pyott*, of the one part, and *Peter Johnson* of the other part, after reciting the Sales of the settled Property, and that *Johnson* had, at the request of Mr. and Mrs. *Pyott*, executed the Conveyances of the before-mentioned Estates, and signed the Receipts on the back thereof, but that *Johnson* did not actually receive any part of such Sums: it was witnessed that Mr. and Mrs. *Pyott* did thereby acknowledge that *Johnson* did not, on executing, and signing Receipts on the several Conveyances, actually receive any part of the sums of Money before mentioned, but that such of the same Sums as had been already paid, had been paid to Mr. and Mrs. *Pyott*, and, therefore, they released *Johnson* from all those Sums, except such of them as had been laid out in *Johnson's* name: and Mr. and Mrs. *Pyott* covenanted, with *Johnson*, that they would, as soon as conveniently might be, lay out and invest such of the Sums as had been already received, and not laid out and invested, and also the other Sums, as from time to time they should receive the same, amounting altogether to 14,206*l.* 13*s.* 4*d.* in the purchase of Freehold Lands free from Incumbrances, or in the purchase of Stock in the Funds, or on mortgage of Freehold Estates, free from Incumbrances, of good and sufficient value, in the name of *Johnson*, to be conveyed, assigned and transferred to *Johnson* and his Heirs, upon the Uses and Trusts declared, in the Settlement, of the Estates so sold and disposed of. And, by the same Indenture, *Johnson* covenanted, with Mr. and Mrs. *Pyott*, that,

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from time to time, when the several Sums amounting to 14,206*l.* 13*s.* 4*d.* or any part thereof, should have been so laid out and invested as aforesaid, he would stand possessed of the Freehold Estates, Stocks, Funds and Securities, so to him to be conveyed, assigned and assured, upon and for the Uses, Trusts and Purposes declared, in the Settlement, concerning the Estates so sold, or upon such of them as were then undetermined and capable of taking effect.

Mr. *Johnson* died on the 1st August 1796, leaving the Defendant Sir *Robert Johnson Eden*, then *Robert Eden*, Esquire, his Grandson and Heir at Law.

In the year 1800 Mr. and Mrs. *Pyott*, under the Power of Sale in the Settlement, sold the Entirety of *Stoneheap Farm*, and of the before-mentioned Tithes, for 5,000*l.*, and required *Robert Johnson Eden*, as the Heir at Law of *Peter Johnson*, to join in such Sale, which he accordingly did; and, in the Conveyance thereof to the Purchaser, was contained a recital, similar to that contained in the former Conveyances, as to the application of the Purchase-money, until a purchase of other Lands could be effected; and 2,500*l.*, part of such Purchase-money, was left upon mortgage of *Stoneheap Farm*, but was afterwards paid off, and the Money received by Mrs. *Pyott*; and 1,500*l.*, further part thereof, was, on the 19th of April 1800, advanced to *Henry Godfrey Faussett*, and secured upon mortgage of the Manor of *North Court*, and certain Hereditaments in the Parishes of *Nether* and *Upper Hardres*, *Patricxbourne* and *Bridge*, in *Kent*, in the name of *Robert Johnson Eden*; and 1,000*l.*, residue of the 5,000*l.*, was laid out, in the name of *Robert Johnson Eden*, in the purchase of

1,079*l.* 5*s.* 6*d.* five per cent. Annuities, but which were afterwards sold, and the Money received by Mrs. *Pyott*.

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Mr. and Mrs. *Pyott* never had any Issue. Mr. *Pyott* died in July 1804, intestate as to his Real Estates, leaving Mrs. *Pyott* him surviving; and, by his Will, dated the 28th February 1789, he bequeathed his Personal Property to her, and appointed her his Executrix. Mrs. *Pyott* died in July 1816.

It was supposed, when and before the Bill was filed and was so stated in it, that, at Mr. *Pyott*'s decease, Mrs. *Pyott* was his Heir at Law, they, as is before mentioned, having been related to each other before their Intermarriage; but, in the progress of the Suit, it was discovered that, when that event took place, Sir *Robert Johnson Eden* was his Heir at Law; and his Co-heirs in Gavelkind were Sir *R. J. Eden*, Morton *John Davison*, Esquire, and Mrs. *Pyott*.

At Mr. *Pyott*'s death the whole of the Estates comprised in the Settlement had been sold, and the produce of the Sales consisted of 1,307*l.* 11*s.* 6*d.* New South Sea Annuities, standing in the name of *Peter Johnson* or his Representatives, the Mortgages for 8,900*l.*, 1,000*l.*, 2,500*l.*, and 1,500*l.*, the sum of 336*l.* 6*s.* 5½*d.* lent, with other Monies, to *Sarah Nott*, and 1,079*l.* 5*s.* 6*d.* five per cent Annuities standing in the name of Sir *Robert Johnson Eden*. After Mr. *Pyott*'s death, the 1,307*l.* 11*s.* 6*d.* New South Sea Annuities, were transferred into the name of Mrs. *Pyott*, and added to a Sum of 2,900*l.* like Annuities, to which she was entitled, under the Will of her Father *Charles Pyott*, making together 4,207*l.*

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11s. 6d. New South Sea Annuities, and 3,707l. 11s. 6d., part thereof, was, at different periods, sold and disposed of by Mrs. *Pyott* in her lifetime, and the remaining 500l. was sold and disposed of by her Executors, after her death. After Mr. *Pyott's* death the 1,079l. 5s. 6d. five per cent Annuities also, were transferred into Mrs. *Pyott's* name, and were sold out by her on the 20th March 1807, and she received the 2,500l. left on mortgage of *Stoneheap Farm*, and also changed the Security for the 500l. lent to *Sarah Nott*, and took a Bond for that sum in her own name, in lieu of the Promissory Note.

Mrs. *Pyott*, by her Will, dated the 15th of March 1805, duly signed, published and attested, for passing Freehold Estates of Inheritance, after giving several Legacies and Annuities, and devising, unto *George Loop* for his Life, her Cottage or Tenement, with the Garden, Hereditaments and Appurtenances to the same belonging, situate in the Parish of *St. Martin* within the Liberties of the City of *Canterbury*, and then in the occupation of *Mary Cook*; as to her capital Messuage or Mansion-house, wherein she then lived, and the Ground and Appurtenances to the same belonging (which were situate in the same Parish), and all and singular other her Messuages, Lands, Tenements and Hereditaments, and Parts and Shares of any Messuages, Lands, Tenements and Hereditaments, and all other her Real and Leasehold Estates, whatsoever and wheresoever, subject to such Estate and Interest, of and in her said Cottage or Tenement and Premises in the occupation of the said *Mary Cook*, as she had before given to the said *George Loop*, she gave, devised and bequeathed the same respectively, with their respective Rights, Members and Appurtenances, unto the Plaintiffs

William Hougham, and Richard Frend, and George Carter, their Heirs, Executors, Administrators and Assigns, to the use of the Defendant Charles Sandys, for ninety-nine years, to commence from the day of her decease, if he should so long live, he and they keeping the said capital Messuage, Buildings, and other the said Trust Premises in good and substantial repair; and, from and immediately after the determination of that Estate, in the lifetime of Charles Sandys, to the use of the Plaintiffs and George Carter, and their Heirs, during the life of Charles Sandys, in trust to preserve contingent Remainders; and, after the decease of Charles Sandys, to the use of his first and other Sons in Tail Male; and, for default of such Issue, to the use of the Defendant Edwin Sandys, for ninety-nine years, to commence from the day of the decease of Charles Sandys without Issue Male of his body, or from failure of such Issue Male after his decease, as the case might be, if he, the Defendant Edwin Sandys, should so long live, he and they, in the like manner, keeping the Trust Premises in good and substantial repair; and, after the determination of that Estate in the lifetime of Edwin Sandys, to the use of the same Trustees, during the life of Edwin Sandys, in trust to preserve, &c.; and, after the decease of Edwin Sandys, to the use of his first and other Sons, in Tail Male, with divers Remainders over.

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And the Will contained a Power enabling *Charles Sandys* and the other Devisees, when they should be in possession or be entitled to the Rents and Profits of the Estates and Premises thereby devised, to lease the same, or any part or parts thereof, for fourteen years, in possession, at the best improved yearly Rent, without taking any Fine, and so as none of the Lessees

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should be made dispunishable of Waste, and every such Lease should contain a Power of Re-entry for nonpayment of Rent; and the same Persons were forbidden to let the Mansion-house for a Mess-house, Barrack, Boarding or Lodging-house, or for any purpose except the residence of a private family.

And the Testatrix's Will was that all the Household Goods, Household Furniture, Books, Pictures, Silver Plate and China, that should be in or about her said capital Messuage, and the Buildings and Gardens thereto belonging, at the time of her decease, (except such of them as she should otherwise dispose of by any Codicil or Codicils to that her Will,) should be deemed as Heirlooms, and for ever be enjoyed, as far as the Law would admit, by the Person and Persons who, for the time being, should be in possession of, or entitled to the Rents and Profits of the same capital Messuage, Buildings, Gardens and Premises, by virtue of her Will. And the Testatrix directed that, as soon as conveniently might be after her decease, her Trustees and Executors should cause an Inventory to be made of all the Household Goods, Furniture, Pictures, Books, Silver Plate and China, which were to continue and remain and be used in the same capital Messuage, Buildings and Gardens, according to her Will; and that *Charles Sandys*, and all other Persons, who, by virtue of her Will, were to have the use of the said Goods, should, at or before the time of taking possession thereof, give a Receipt for the same, under their respective hands, at the foot of the Inventory. And the Testatrix thereby also gave and bequeathed unto *Charles Sandys*, for his own use and benefit, all her Household Linen, Jewels, Trinkets and other Effects, (except as thereinbefore was excepted, and except ready

Money and Securities for Money,) which should be in or about her said capital Messuage and Premises at the time of her decease, and which she should not otherwise dispose of by any Codicil or Codicils to her Will.

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And, as to all her ready Money and Securities for Money, Money in the Public Stocks or Funds, Debts which should be due and owing unto her at the time of her decease, and all other the rest and residue of her Personal Estate, whatsoever and wheresoever, and of what nature, kind or quality soever the same should consist or be, at the time of her decease, which she had any right or power to dispose of, not therein otherwise disposed of, and which she should not otherwise dispose of, and whether such Property respectively should be vested or standing in her own name, or in the name or names of any Person or Persons in trust for her, or for her use and benefit, and subject to the payment of her just Debts and Funeral Expenses, the charges of proving her Will, and other incidental expenses touching the same, and after the payment of the several Legacies and Annuities by her thereinbefore given and bequeathed, and to be thereafter given or disposed of, by any such writing or writings as aforesaid, she gave and bequeathed the same, and every part and parcel thereof, and all her Estate, Right, Title and Interest therein respectively, unto the Plaintiffs and *George Carter*, their Executors, Administrators and Assigns, upon Trust, as soon as conveniently might be after her decease, to sell and convert into Money all such part or parts of her Personal Estate as should not consist of Money or Securities for Money, and also to receive and get in all such part and parts thereof as should consist of Money and Securities for Money, and thereupon, or with all convenient

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speed, to lay out and invest the Monies arising thereby in the purchase of capital Stock, in some one or more of the Public Stocks or Funds of this Kingdom, in the names of her said Trustees, or the Survivors or Survivor of them, or the Executors or Administrators of such Survivor, and to stand possessed of all such capital Stock so to be purchased, and the yearly Dividends, Interest and Produce thereof, and also the capital Stock which she should be possessed of or entitled unto, and the yearly Dividends, Interest and Produce thereof, upon Trust for all and every the Children of her Cousin *Edwin Humphrey Sandys* lawfully begotten and to be begotten, as well Sons as Daughters, and all and every the Children of *Henry Godfrey Faussett*, on the body of *Susan*, the Testatrix's Cousin, his late Wife, deceased, lawfully begotten, including her late Husband's Godson the Defendant *Robert Faussett*, and her God-daughter the Defendant *Anne Faussett*, notwithstanding their respective Legacies thereinbefore mentioned, equally to be divided between the said Children respectively, share and share alike, and their several and respective Executors, Administrators and Assigns, without regard to the number there might be of each family, and as if they were all the Children of the same Father; the Parts or Shares of such of the said Children as were or should be Sons to be assigned, transferred and paid unto them, severally and respectively, when and as they should attain the age of twenty-one years, and the parts or shares of such of them as were or should be Daughters to be assigned, transferred and paid unto them, severally and respectively, when as they should severally attain that age, or be married, which should first happen, with benefit of Survivorship, amongst the said Children, if any one or more of them, being a Son or Sons, should

happen to die under the said age, or, being a Daughter or Daughters, should happen to die under the said age and without having been married. And she thereby appointed the Plaintiffs and the Defendant *George Carter* joint Executors of her Will.

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The Testatrix made a Codicil, dated the 2d of March 1813, and thereby, after reciting the Bequest, in her Will, that her Household Goods, Furniture, &c. should be deemed as Heir-looms to her capital Messuage, Buildings, Gardens and Premises, revoked the said Bequest, and gave those articles unto *Charles Sandys* absolutely.

The Testatrix died on the 24th of July 1816; and, on the 24th of August following, the Plaintiffs *Hougham* and *Frend*, alone, proved her Will and Codicil, and took upon themselves the execution of the Trusts thereof, the Defendant *George Carter* having declined to join with them in so doing.

At the Testatrix's decease, Sir *R. Johnson Eden* was her Heir at Law, and also the Heir at Law of her late Husband: and Sir *R. J. Eden*, and Mr. *Morton John Davison*, were the Co-heirs in Gavelkind of the same two Persons.

The Testatrix, at her decease, was seised of no Real Estates not included in her Marriage Settlement, except her Property in *St. Martin's* Parish, in or near to *Canterbury*, and which consisted of a Mansion-house (in which she resided), with Coach-houses, Stables and other Out-buildings, fit for the residence of a large Family, and Gardens, a Shrubbery, and a small Field, containing

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two roods and five perches, adjoining the Mansion-house, a small piece of Ground opposite to the door of the Mansion-house, and five small Cottages, which were separated from the Mansion-house by a Turnpike-road, one of which she devised to *Loop* for his Life, as before mentioned, and the others were let to different Tenants, at Rents amounting to 13*l.* 7*s.* per annum.

The Testatrix, when she made her Will, was entitled to some funded Property, and two Sums secured by Bonds, none of which were in dispute in this Cause; but, at her death, her Personal Estate, if the Sums in question in this Cause were not to be included in it, was not nearly sufficient to pay her Debts, Funeral Expenses and Legacies; and no part of her Personal Estate was then standing in the name of a Trustee.

After the Testatrix's death, the Deed-poll of April 1761, was found amongst the Title-deeds of the Property in *St. Martin's* Parish; and, at the foot of it were written, in the hand-writing of the Testatrix, but without date, directions as to the time, place and manner of her Burial; and the Mortgage-deeds for securing the Sums of 8,900*l.*, 1,000*l.* and 1,500*l.* were also in her possession at her death: but the Deed-poll of June 1760 could not be found.

At the Testatrix's decease, the produce of the settled Estates sold as before mentioned, and which had not been received or disposed of by her, consisted of the Mortgages for 8,900*l.*, 1,000*l.* and 1,500*l.*; and the 5,00*l.* lent to *Sarah Nott*, were unpaid.

Edwin Humphrey Sandys, the Father of the Defendant *Charles Sandys*, and a Witness in the Cause for

him and the other Devisees under Mrs. *Pyott's* Will, deposed that he was employed by Mr. and Mrs. *Pyott*, as their Solicitor, in the Sales before mentioned; and that he was employed, by all the Parties interested in such Sales, in investigating and making Abstracts of the Titles of the Premises sold, and in preparing the Conveyances to the several Purchasers thereof; and that, on the occasion of any such Sales, or on completing the same, or making out the Title to the Premises, the Deed-poll of April 1761 did not form part, nor was considered to form part of the Title, or of the Evidence of the Title, of Mr. and Mrs. *Pyott*, to their Share of the Premises, or any part thereof; and that such Deed-poll was not noticed, or in any manner used on the occasion of any such Sales, or in any Abstract of Title made out on the occasion thereof, or of any Conveyance executed in pursuance thereof. The Evidence of *John Jennings*, who was the managing Clerk of *Edwin Humphrey Sandys* at the times of the Sales, was to the same effect; and he added that he never heard or knew of the existence of the Deed-poll until three Months before his Examination, when he was informed of it by the Defendant *Charles Sandys*.

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The two following Letters were proved in the Cause, on behalf of the Devisees. The first was dated the 23d of September 1793, and was from Mr. *Pyott* to Mr. *Faussett*, and contained the following passages:—"I am very glad you approve of my hint of planting more alders upon *Northbourne Farm*. *Legeyt* (a Surveyor) knows the worth of wood in that country. He, I dare say, will approve for his Employers. *Edwin*, who has now the greatest Share, must see the consequence in a few years; for I have not the least doubt that, in the

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course of ten years, the Wood, felled upon the Estate, will pay the annual expense of Repairs. *I have the least interest in it, as my life is not worth ten years purchase, and as the Estate will not go to my Family."*

The second was written on the 2d of June 1795 by Mr. Pyott to Mr. *Edwin Humphrey Sandys*, his Solicitor, and related to the Sales. It contained the following passage: "You are welcome to the 300*l.* But then you will remember to be punctual: *as you know I have no Money arising from the Sales but what is resettled.*"

Three Letters, written by Mr. Pyott to different Persons, were proved on behalf of the defendant Sir *Robert Johnson Eden*. The first was dated the 23d of March 1794, and in it he alluded to the *Northbourne* and *York* Estates, and mentioned them as a part of his settled Property. The second of these Letters was dated the 15th March 1795, and contained the following passage: "I have now resolved to have no more Money laid out on Mortgage or Land, but the *York* and yours: what surplus there may be, I will venture in the Stocks." The third was dated the 27th of June 1798, and contained directions for preserving the Mortgage-deeds from fire. The last was dated the 26th of July 1796, and was partly as follows: "*Stoneheap Farm* appears a pretty dear purchase. However, I am satisfied."

On behalf of the residuary Legatees under Mrs. Pyott's Will, was proved a Letter from that Lady to Mr. *George Ellin*, on a Mortgage of whose Estate the 8,900*l.*, one of the Sums arisen from the Sales, was secured. It

was dated *Canterbury*, 30th December 1814, and was as follows: "Sir, In compliance with your Letter of the 15th instant, I have to acknowledge the receipt of the two last half years' Interest remitted to me by Messrs. *Raper, Swan* and Co. In regard to the sale of the one Lot of Land, sold by auction, I am not desirous of receiving the 725*l.* But should you, at any future time, dispose of a larger proportion, I will thank you to give me due notice, that I may determine on what arrangement to make concerning the Mortgage I hold. With respect to any legal concurrence, you will address your application to my Solicitor, *Charles Sandys*, Esq. of this City. I remain," &c.

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The Suit was instituted by *William Hougham* and *Richard Frend*, the acting Trustees and Executors of *Mrs. Pyott's Will*, against the Devisees and the residuary Legatees under that Will, and also against Sir *Robert Johnson Eden*, as the Heir at Law of *Mr. Pyott*, *Mr. Morton John Davison*, as one of that Gentleman's Coheirs in Gavelkind, *William Walton*, Esquire, the Representative of *Peter Johnson* and *Dorothea Johnson* his Executrix, and also against *George Carter*, Esquire, the other Executor and Trustee of *Mrs. Pyott's Will*, but who had refused to act. The object of the Suit was to have the Rights and Interests of the four first-mentioned classes of Defendants to and in the 8,900*l.* and the other Sums arisen from the Sales of the settled Estates remaining undisposed of, ascertained and declared by the Court.

The Master was directed, by the Decree made on the hearing of the Cause, to make the following inquiries: First, whether any such Deed-poll as, in the Instru-

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ment of the 14th of April 1761, was stated to have been dated on the 20th of June 1760, was made and executed; and, if the *Master* should find that any such Deed-poll was made and executed, then he was to state the purport and effect of it, and how it was executed and attested: 2d. who, at Mr. *Pyott's* death, would have been his Heir at Law of the Property in question, assuming it, for the purpose of the inquiry only, to have been his Property: 3d. what Sales had been made of the Trust Estates, and when, and to whom, and at what prices; and how the produce of such Sales had been, from time to time, invested or applied; and of what the same consisted at the deaths of Mr. and Mrs. *Pyott*, with liberty to the *Master* to state any special circumstances as to the dealing of the several Parties, with respect to the produce of such Sales, either in the lifetime or since the death of Mr. *Pyott*.

The facts found, by the *Master*, in obedience to this Decree, are embodied in the preceding part of this Report. The *Master's* Report omitted to state how the Execution of the Deed-poll of April 1761 was attested. The fact was that the Sealing and Delivery of it only, and not the Signing, were noticed in the Attestation.

The Cause now came on to be heard for further Directions. The questions were: Whether the 8,900*l.* and the other Proceeds of the Sales remaining undisposed of, were to be considered as part of Mrs. *Pyott's* Personal Estate, or whether they were to be considered as Real Estate, and, if they were, whether they passed by the Devise contained in Mrs. *Pyott's* Will, or whether

under the Deed-poll of April 1761, Sir *Robert Johnson Eden* was exclusively entitled to them as Mr. *Pyott's* Heir at Law, or whether Mr. *Davison*, as one of the Co-heirs in Gavelkind of Mr. *Pyott*, was entitled to share, equally with Sir *Robert Johnson Eden*, the other Co-heir, in the Proceeds of such parts of the Estates as were situate in *Kent*.

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Mr. *Boteler* appeared for the Plaintiffs, the two acting Executors and Trustees of Mrs. *Pyott's* Will, but did not argue any of the questions.

Mr. *Spence* and Mr. *Knight*, for Mrs. *Pyott's* Residuary Legatees :—

First, in respect to Sir *Robert Johnson Eden's* Claim : That arises under the Deed-poll of April 1761. By the Settlement, the Appointment was to be under the hand and seal of Mrs. *Pyott*, and to be attested by two Witnesses. Now, the Signature of Mrs. *Pyott* is not attested, and, consequently, that Power was not duly executed, unless it was rendered valid by 54 Geo. 3, c. 168. But, taking all the circumstances of this Case into consideration, especially those acts done by Mrs. *Pyott*, in the interval between the execution of the Power and the passing of that Statute, which are irreconcilable with the supposition that the Appointment was a good one, the defect is not cured by the Statute.

Down to the year 1814, when this Statute was made, this Deed, according to the Decisions in *Wright v. Wakeford* (a), and *Doe v. Peach* (b), was not a good Exe-

(a) 4 Taun. 213.

(b) 2 M. & S. 576.

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cution of the Power. Whilst the Execution remained void, Mrs. *Pyott* made, what is, within the terms of the Act, an Entry or Claim, which was so perfectly inconsistent with that Appointment, that it must be considered as defeating it. She received and disposed of a very large proportion of the Monies for which the settled Estates were sold, and, thereby, treated them as her own. She had no more right to receive that Part, than she had to receive the Remainder; and therefore, this being, at the time, a void Appointment, she has prevented it from being made good by this Act of Parliament. The Deed-poll was in her possession. It was found with some Title-deeds of Property to which it did not, in the least degree, belong.

[The *Vice-Chancellor* :—She was Executrix to her Husband.]

Mrs. *Pyott* did not actually cancel this Document, because it was in a place where she could hardly expect to find it. This is therefore a Case within the Proviso of the Act: "That this Act shall not extend, nor be construed to extend, to revive or give effect to any Appointment, Revocation or other Assurance heretofore made, as far as the same has been avoided by Entry or Claim." Consequently the Appointment is good for nothing, and Sir *Robert Johnson Eden's* Claim is totally out of the question.

Next, as to the Claim made by the Devises. Mrs. *Pyott* not only had the Power of Appointment, but the Property, the subject of the Power, was absolutely hers in default of Appointment.

Now, was this Real or Personal Estate in Mrs. *Pyott*?

In order to show what she considered the nature of the Property to be, her acts and dealings may be admitted in evidence. *Hinchcliffe v. Hinchcliffe (c)*, the Case on the Bishop of *Peterborough's* Will; where Evidence was admitted to show what he considered to be his Property at the time he made his Will, with a view to a Case of Election under the Will: and that was not decided by the Words of the Will solely, but by those Words aided by extrinsic Evidence. *Druce v. Denison (d)* is an Authority to the same effect. If extrinsic acts would be Evidence for the purpose of giving effect to a Will, with reference to a question of Election, are they not equally Evidence, for the same purpose, with reference to the question, in what state the Testatrix considered her Property to be. Admitting it to be settled that Property is not to be taken as it was found at the death of the Owner, but that it ought to be considered as Realty, though it is, in fact, Personalty, or Personalty, though it is, in fact, Realty, notwithstanding an absolute Interest be vested in the Party, still some acts may be given in evidence to prove that the Party intended that the Property should remain as it was, and not as it ought to have been. If any such act, done by a Person who has the absolute Ownership, is proved, the right to convert that Personalty into Realty, or that Realty into Personalty, is gone as between the Representatives of that Person. *Ashby v. Palmer (e)*. Now, what are the acts of this Testatrix? She has done all those acts which, for another purpose, have been brought under the consideration of the Court, namely, dealt with this Property as Personal and as her

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(c) 3 Ves. 516.

(d) 6 Ves. 385. See also *Pole v. Lord Somers*, Ibid. 309.

(e) 1 Mer. 296.

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own. She called in Stock which, as will be argued on the other side, was outstanding for the purpose of being invested in real Estates, invested it in her own Name, and sold it out from time to time: she called in a Sum due upon a Mortgage, and invested it upon a Bond. These acts of the Testatrix, though applying only to a particular portion of the Property, showed her intention, as to the whole, that the Property should be Personalty and in her own power. And it is material to recollect that the Trustee obeyed her directions, and did not suggest that any Trust was reposed in him, which could prevent her from dealing with the Property at her pleasure.

Unless the Property in dispute passes, there will be a part of the Will which will be wholly inoperative. The Decision in *Standen v. Standen* (f), (which was affirmed in the House of Lords), is an Authority upon this point. In that Case the words were: "whether Real or Personal;" here they are: "whether in my own Name, or in the Name of any Person or Persons in trust for me." The Court, in the Case of *Standen v. Standen*, thought that both the alternatives of the Will must be satisfied: and so, here, both the alternatives of this Will must be satisfied, which they cannot be, unless this Property passes; as the Testatrix had no other in the Name of any Trustee in trust for her. The Testatrix also devises, specifically, certain Real Estates: and, if the Court does not hold that this Property is Personal Estate, it is undisposed of altogether; for she had Estates to which the expression: "all other my Real Estates" apply, namely, the Cottages. Therefore, if this is not to be considered as passing under the

(f) 2 Ves. J. 589, and 6 Bro. P. C. 193, ed. Toml.

residuary Clause in the Will, a Clause which shows the utmost anxiety, on the part of the Testatrix, not to die intestate, there are no words in this Case which can carry it to any body. As then there are words which show that the Testatrix intended to devise all her Estates, and all her Property, and as this clearly was her Property, it must pass, either under the Clause in the Will giving her Real Estate, or under that which gives her Personal Estate. It cannot, for the reasons before stated, pass under the Devise of the Real Estate, and, therefore, must pass under the Clause which disposes of the Personal Estate.

There is another circumstance that ought to be mentioned, which is, that *Mrs. Pyott*, at her death, had all the Deeds, by which this Property was secured, in her possession

[*Mr. Horne*:—

She was her Husband's sole Executrix, and was supposed to be his Heir at Law.]

Next: the settled Estates had been wholly sold in *Mr. Pyott's* lifetime. Now it is settled that, when an Heir at Law takes personal Estate, because it has been impressed with the character of Realty, he takes it as Personal Estate, and it does not remain as Real Estate in him. *Mrs. Pyott* was one of her Husband's Co-heirs in Gavelkind; and, therefore, taking the Appointment to be good, she would still, as one of the Co-heirs, succeed to a portion of that Property. The Money arisen from that portion of the Property, though she took it impressed with the character of Real Estate, would be Personal Estate in her, and therefore that, at all events, belongs to those who represent her personal Estate.

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Mr. *Sugden* and Mr. *Bickersteth*, for the Devisees
under Mrs. *Pyott's* Will:—

The Deed-poll of April 1761, is not now an operative Instrument. The Property, having originally been Real Property, has retained its original character, and passes by the Devise in the Will.

The first objection to this Deed-poll, is that it is founded on the execution of a Power of Revocation, stated to have existed in a former Instrument, of the contents of which every body is ignorant. The Appointment must, therefore, fail, because it can only be sustained as a valid execution of the Power, by showing that the requisites of the Power were pursued. That has not been done. But, if it could be presumed that the requisites of the Power had been complied with, this is not a Case in which such a presumption could be admitted; because, notwithstanding the supposed execution of the Power which gave the Estate to the Husband, he never claimed it, and never considered himself as entitled to any benefit under the Appointment.

There are two other reasons, that appear on the face of the Appointment itself, for holding it to be inoperative: 1st, that it is testamentary; 2dly, that it was not to operate unless the Husband survived the Wife, which event did not happen. It appears that this Deed-poll was intended to be a testamentary Instrument, from the directions written, at the foot of it, by Mrs. *Pyott*, as to her burial; and because it was not to operate at all until her death. It is quite clear that she did not mean to destroy her own Power, to defeat her own Estate, or to break in on her Rights, except in the event of her death. But, if this Instrument is not testamentary,

no interest is to be taken under it, except in the event of the Husband surviving the Wife, which did not happen. But, if these objections do not prevail, then we contend that this Appointment has been waived, by a long course of dealing, or rather the dealings have been such as will let in a presumption, either of a Revocation or of a Release. The Evidence for the Devises shows that Mr. *Pyott* never had the remotest suspicion that he had any interest whatever in this Property. In a Letter written by him on the subject of the Property, on the 22d of September 1793, he treats himself, simply, as Tenant for Life, and states that his Family will never have any interest in this Property.

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Next, the Appointment is wrong in point of Form, because the Signature is not attested; and no construction of the 54 Geo. 3, c. 168, can possibly be admitted which would go to revive, as a valid Instrument, that which, by a long course of dealing, for half a century previously, had been treated and intended, by all Parties, to be an inoperative Instrument. That was not the intention of the Act. The intention of the Act was that, if there was a Title that had been acted upon as good, under any Appointment, then the informal execution of the Power should not be a blot on the Title. The legal or equitable means, by which this Appointment has been avoided, are the acknowledgments, of all Parties, that it was void. The Husband, who was interested under that Appointment, never once lays the least claim to the Property. He writes Letters which are the most decisive Evidence that he did not consider himself entitled to it. He makes no disposition of it by Act *inter vivos*, or by his Will. The *Master's* Report shows a long course of dealing, by the sale of

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the Estates and declarations of Trust, in which no pretence of Right is even set up, on the part of the Husband; and, in the directions for investing the Monies produced by the Sales, in the purchase of other Estates to be settled, the Parties refer to the old Uses, and never to any new Uses introduced by means of the Power of Appointment.

There is another ground on which it may be contended that this Appointment is at an end, namely, that Mrs. *Pyott* had a Power to revoke by either Deed or Will. Now her Will cannot be satisfied except by bringing in to its operation the very Property in question: therefore, by devising Property which is necessary to give effect to the words of her Will, that Will operated as a Revocation and new Appointment.

The next consideration is, whether there was a conversion of this Property from Real into Personal Estate?

The Power of Sale in this Settlement, is a conditional Power, and is much stricter than the common Power of Sale and Exchange, used in modern times. This is a Power to sell and exchange, so that, in case of a Sale, the Monies arising by sale should be invested in the purchase of other Estates, and that *then, and in such case*, the Estates limited by the original Instrument shall cease and determine. The limitations of the original Estate do not cease and determine until the Monies produced by the Sale are re-invested in the purchase of other Lands, and all those Lands are resettled to the old uses. *Doe v. Martin* (g); *Burgoigne v. Fox* (h). As these Uses were never to be defeated, except by introducing other Estates,

(g) 4 T. R. 39.

(h) 1 Atk. 575.

subject to the limitations of the Settlement, the intention of the Parties to this Settlement was that the Property settled, or that which should come in lieu of it, never should lose the impression which had been put on it of the character of Real Estate, until some person who had the absolute Estate in Fee Simple, chose, at once, to put an end to it, and convert it into Personalty. It is impossible that any state of circumstances could exist which, in such a case, could enable Parties to change the character which that Property had acquired by the Settlement; the object of those Parties being, during the whole continuance of the Uses of that Settlement, to keep the Property subject to those Uses, whether it was the old or the substituted Property, impressed with the character of Real Estate. Now what were the acts done with a view to change this character? Every one of the acts of these Parties, so far from showing that it was their intention that there should be a change of character, would have themselves changed the character if even it had been Money, whereas it is impressed with the character of Real Estate; and it is for the other side to show that it has lost that original character, and has been converted into Personalty. In all the Conveyances to the Purchasers, except one, there is a recital that it was the intention of the Parties to re-invest the Money in the purchase of other Lands, pursuant to the directions of the Settlement. What stronger declaration than this could be made, that the original character should continue? So far from there being an attempt at a conversion, there is the most express declaration by the Parties, that the Money shall continue as Personal Estate until it could be re-invested in Land, and no longer. Then what was done with the Monies? They

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were all invested in Securities, in the name of a Trustee, for the express purpose of being re-invested, according to the directions of the Settlement. Those recitals were inserted, in the different Conveyances to the Purchasers, for their security and indemnity, and to fix the Trustees so that they could never depart from the Trust which they had to execute. The Purchasers knew that, unless the Property was retained as Realty, they never could have a Title. Can it be allowed, therefore, that, by construction, the Court should be asked to hold that the Trustees have committed a breach of Trust, the effect of which would be to defeat that very Title which they themselves professed to make? A Court of Justice was never called on to make a stronger presumption against all propriety. Upon this point the Deed of the 14th of January 1796 is of great importance: it not only proves that Mr. *Pyott*, himself, set up no claim to this Property, but considered the original Uses of the Settlement as existing Uses. It also proves, to demonstration, the intention to keep the character of Real Estate impressed on the Property.

The Testatrix, at the time of making her Will (without regard to the Fund which is the subject of discussion) had, in the language of her Will, Securities for Money, and Money in the Public Stocks or Funds. Under these circumstances she addresses herself to the duty of making her Will. On the face of it we find a devise of Real Estate, and a bequest of Personal Estate; and the only question is under which the Property in dispute is to pass. The devise of her capital Messuage or Mansion-house, and the Buildings, Gardens, Grounds and Appurtenances to the same belonging or therewith used, would pass the whole of the

Property in *Saint Martin's* Parish, including the Cottages. *Doe v. Collins*(i). But if that devise does not include the Cottages, they will pass by the words: "and all and singular other my Messuages, Lands, Tenements and Hereditaments, and Parts and Shares of any Messuages, Lands, Tenements or Hereditaments." Then follow these words: "and all other my Real and Leasehold Estates whatsoever and wheresoever." There must then be something still left for those other words to operate upon. What can pass by them but the Money impressed with the character of Real Estate, which was, to all intents and purposes, Real Estate? In another part of the Will we shall find, not only the Limitations, which show that she had a considerable Estate in her view, but also a Power of Leasing, which it is impossible for any body to read without being satisfied that she meant considerable Property to be acted on by her Will. The words that occur in this Power of Leasing, are never used, unless the subject intended to be demised is Land, in its common acceptation, and not a mere Messuage. The whole form of the Will is decisive of her intention to give a considerable Property as Real Estate, in short, to give every thing that had the character of Real Estate, or was impressed with that character; and she has expressed that intention in too unambiguous a manner to admit of doubt. Then comes the gift of the Personal Estate, under which it is insisted that this Property passes.

The first observation that arises on this part of the Will, is that there is no Property here given, but what the Testatrix had Property to answer, independent of that in dispute. The words: "and whether such Property

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(i) 2 T. R. 498.

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be vested, or standing in my own name, or in the name of any Person or Persons in Trust for me, or for my use or benefit," are general words, and do not designate any Property standing in the name of other Persons as Trustees, but show that she meant to give all her Personal Estate, whether in her own name, or in the name of any Person as Trustee for her. As late as 1804, there had been a fund of Trust-money standing in the name of a Trustee for her, and which she afterwards received. She might suppose that there was other Trust-money that was still outstanding. It is impossible she could mean to include, under such words as these, that which was worthy of being put forward as a substantive subject of gift, that the Parties might know what she was so liberally bestowing upon them. Besides, the Testatrix expressly refers to the parts and shares of different Estates; and those words seem to be used for the express purpose of pointing out the particular source from which these Funds arose.

It has been argued that, because some portion of the Monies was afterwards withdrawn from the Trusts on which they were placed, and disposed of by Mrs. *Pyott* at her own pleasure, and by that means converted from Land into Personalty, therefore, the whole must be considered to be so converted. That is an argument which is without any foundation at all; and, if it had any effect, it must tend to show that what she did not do with respect to the other Funds, she never intended should be done at all.

The Decision of the House of Lords in *Standen v. Standen* (k), was expressly confined to the Real Estate;

(k) 6 Bro. P. C. 193.

and, whenever that Case is cited, it is always confined, as an Authority, to the Real Estate: it, therefore, is a decision which supports the claim of our Clients. Not only are the facts, as they appear by the Deeds, all in favour of the Devisees, but, down to 1804, this Lady was a married Woman, and, therefore, until that time she could do no act to convert the Property from Real into Personal Estate. *Rashley v. Masters* (l); *Kirkman v. Miles* (m); *Biddulph v. Biddulph* (n); and *Wheldale v. Partridge* (o), are Authorities in favour of the Devisees' claim.

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Mr. Horne, Mr. Pepys and Mr. Turner, for Sir
R. J. Eden:—

A portion of the settled Estates, not distinguished, by any thing in the Settlement, from the rest, consisted of Land of gavelkind tenure. There was one general Power of selling and exchanging in the Settlement, without reference to the peculiar tenures of the Property; and the question, upon this part of the Case, is, what is the character of the Money produced by the Sale of those gavelkind Lands? Nobody will deny that, from the moment when that gavelkind Land was sold, and therefore became entirely out of the Settlement, the Parties had nothing to do with that Land, but only with the Money produced by its sale; and the Settlement declares, generally, that the Money produced by the Sale of the Real Estates originally in the Settlement, shall be re-invested in the purchase of Real Estate, not that the proceeds of the gavelkind Land, shall be re-invested in other Lands of gavelkind

(l) 1 Ves. J. 201.

(m) 13 Ves. J. 338.

(n) 12 Ves. 161.

(o) 8 Ves. 227.

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tenure, or the proceeds of the Land of common-law descent, be invested in Lands of common-law descent. It is, therefore, impressed, till it is laid out, with the character of Real Estate: and the question is, whether it is impressed with the character of that Real Estate of which it was the produce. Now, when we say it is Money impressed with the character of Real Estate, it is not because it is Money produced by the Sale of Real Estates, but because the Settlement declares that it shall be laid out in Land. It is impressed, therefore, with the character of Real Estate, not with reference to the Lands sold, but with reference to the Lands to be purchased. If the Lands to be purchased were to have been gavelkind Lands, there ought to have been a declaration in the Settlement to that effect, because that is an exception from the general law of England with respect to tenure; and, there being no such direction, the legal inference is that the Lands to be purchased, are Lands of common-law Inheritance.

It is clear, from the evidence, that the Deed-poll of 1760, must have been destroyed in Mrs. *Pyott's* lifetime.

If there was any informality in the attestation of the Deed-poll, the defect is remedied by the 54 G. 3, c. 168. The dealing with the Property, which it has been contended had the effect of an Entry or Claim, took place in consequence of the mistaken notion, then entertained, that Mrs. *Pyott* was her Husband's Heir; and, therefore there was no Person, as she thought, with whom she could contest the Appointment. Mrs. *Pyott* did not destroy the Deed-poll of 1761, but preserved it.

That Deed-poll was not testamentary, either in form or in substance. It reserved a Power of Revocation, which would have been unnecessary, if it had been a Testamentary Instrument; and it operated from the time of its execution, by giving an Interest vested *in presenti*, to commence in enjoyment, *in futuro*. Nor was the Appointment intended to operate in the event only of Mr. *Pyott* surviving his Wife: for it extends to the Children of the Marriage and to Mr. *Pyott*'s Heirs.

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The Will, neither by expression nor inference, shows an intention to revoke the Deed-poll. It contains no disposition of the disputed Property. The Cottages satisfy the Residuary Devise. *Doe v. Collins*, does not apply, for the Cottages were not occupied with the Mansion-house, but were let to different tenants. If Mrs. *Pyott* had intended to revoke the Appointment, she might have done it in two lines.

Then it is said that a Release is to be presumed. Now, Mr. *Pyott*, in his letter of September 1793, speaks of his Life Estate in the Property, which he could not have had except under the Deed-poll: and, in his Letters which have been proved, he treats the Property as his own, as that on which he intends to spend the remainder of his days, and seems most anxious to preserve the Title-deeds relating to it. The expression in one of those Letters, "as the Estate will not go to my Family," is a mere loose expression used to a stranger, and meant nothing. The Property must have gone to his Heir, either by the Appointment, or without it, as the same individual was the Heir of both the Husband and the Wife. At the time the Deed of Covenant of January 1796 was executed, there was no probability

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of Mrs. *Pyott* having Children ; but the Parties seem anxious to preserve the Trusts and Powers of the Settlement. This could be for no other purpose, than to preserve the interests of those who claimed under the Appointment. Why were the large Sums now in dispute, suffered to continue in the hands of Trustees, if the Appointment was revoked or released, and those Sums had become the absolute Property of Mrs. *Pyott*? The Letter from Mrs. *Pyott* to Mr. *Ellin*, was written to a stranger who had nothing to do with the Settlement. She was the visible Owner of the Property. And that Letter affords evidence for us ; for in it she declines to receive the 725 *l.*, and shows, by the reference to her Solicitor, that she knew the Money, if paid in, was to be re-invested in a particular mode, and in the name of Trustees, and not to be paid to her or her Bankers. *Jones v. Tucker* (n) ; *Jones v. Curry* (o) ; *Lewis v. Lewelthyn* (p) ; *Lingen v. Sowray* (q).

Mr. *Simons*, for Mr. *Davison*, one of the Co-heirs in Gavelkind, said that it would be inequitable to hold that the Heir at Common Law was entitled to the whole of the Funds in dispute : that if a Bill had been filed to have the Property re-invested, the Court, when it saw that the bulk of the Property sold had been Land in *Kent*, that the Parties resided in that County, and that part of the Money had been laid out on a Mortgage there, would direct so much of the Money as had arisen from the Sale of the *Kentish* Estates, to be re-invested in Land in that County ; and that, as part of the

(n) 2 Mer. 533.

(o) 1 Swans. 66.

(p) 1 Turn. & Russ. 104.

(q) 1 P. W. 172. S. C. Prec. Chan. 400.

proceeds of the settled Estates had been re-invested in the purchase of the other two-thirds of *Stoneheap Farm*, and as there was no Power given by the Settlement, to re-sell those two-thirds, Mr. *Davison* was entitled together with Sir *R. J. Eden*, to two-thirds of the Money arisen from the Sale of that Farm.

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Mr. *Spence*, in reply :—

The Deed of 1796 operates most strongly in our favour; for it appears by the recitals of it, that Mr. and Mrs. *Pyott* had received the whole of the Purchase-monies; which plainly shows that they considered that they had the whole control over those Monies. That Deed was executed for the indemnity of the Trustees merely, and does not show any anxiety, on the part of Mr. and Mrs. *Pyott*, that the Monies should be considered as Monies to be laid out in Land. The Mortgage-deeds were found in Mrs. *Pyott's* possession at her decease. That shows that she was considered to be the absolute Owner of the Monies, and that it was no longer thought necessary that these Monies should be re-invested in the purchase of Land. Under the word “appurtenances,” in the residuary Devise, the Cottages cannot pass; for they are divided from the Mansion-house by a Turnpike-road, and were not occupied with the House. They passed under the words: “and all other my Real Estates,” &c.; there is, therefore, Property to answer those words.

The Leasing Power refers to the Mansion-house, Gardens and Appurtenances only, and supports our claim. The anxiety which the Testatrix displays about her Property at *St. Martin's Hill*, shows that she considered it to be the most valuable part of her Real Pro-

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perty. *Lingen v. Sowray* (r), is distinguishable from this Case. For there the Wife had an Estate for Life intervening between the Life Estate and the Reversion in the Husband, so that he had not the entire interest in the Property; and, besides, there were some Securities upon which the Will could operate; but here the Will cannot be answered without including in it the Funds in dispute. That Case, therefore, becomes an Authority for us; for, if there had not been any Securities except those in question, in that case, the Court would have come to a different conclusion. Here too Money in the Funds, and Securities for Money, whether in the name of Trustees or of the Testatrix, are specifically bequeathed, and are charged by the Testatrix with Legacies to a very large amount, which shows that she expected that the Funds so charged would be of a sufficient amount to pay the Legacies; which will not be the case if the construction which the Devisees contend for, is to prevail: and, if it does prevail, this part of the Will will be useless, because there will be nothing to answer it. In *Rashley v. Masters* (s) the question in the present Case did not arise, as the dispute was between the Heir and Devisee, and there was no pretence for saying that the 5,000*l.* passed as Personal Property. In *Biddulph v. Biddulph* (t), there was an absence of all intention; and there were Funds to answer either description of Property. *Kirkman v. Miles* (u) is a strong Case in our favour; for, in that Case, the Court held that a presumption of conversion did not arise on a possession for so short a period as two years. But here is a possession of the Mortgages, as Mortgages,

(r) 1 P. W. 172. S. C. Prec. Cha. 400.

(s) 1 Ves. J. 201.

(t) 12 Ves. 161.

(u) 13 Ves. 338.

from 1795 down to 1816, the year of Mrs. *Pyott*'s death. If, in the cited Case, there had been as long a possession as there is in this, the Court would have come to a different conclusion. *Wheldale v. Partridge* (x) is also I submit, an Authority for us, because it decides that the Property must be taken as it is found at the death, Mrs. *Pyott*, in her Letter written in 1814, says "the Mortgage I hold," and, therefore, treats it as her Personal Estate. We therefore contend that the Property in question was converted, out and out, into Personal Estate; but if it was not, we claim it under the specific words of the residuary Clause; for otherwise there will be no Property to satisfy those words, there being, at Mrs. *Pyott*'s death, no Property standing in the name of any person in trust for her, except the Funds in this Cause. *Standen v. Standen* (y).

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The VICE-CHANCELLOR, after stating the contents of the *Master*'s Report, proceeded thus:—

The Claims that have been made to the Funds, the subject of this Suit, are three. First of all, Sir *Robert Johnson Eden*, who is found by the *Master*, to have been the Heir at Law of Mr. *Pyott*, claims, in that character the sums of 8,900 *l.*, 1,000 *l.* and 1,500 *l.*, which were derived from the Sale of the settled Estates; he claims them by virtue of an Appointment, the terms of which I shall shortly have to allude to, which was made in the year 1761, by Mrs. *Pyott*. A claim is also made to the same Sums, by those who are the Devisees under Mrs. *Pyott*'s Will, of her Real Estate, in words on which I shall also have to comment; and a claim is also made to the same Sums, by the Persons who claim under the residuary Bequest in Mrs. *Pyott*'s Will.

(x) 5 Ves. 388, and 8, 227. (y) 2 Ves. J. 589.

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The first question then is, whether, under the Appointment which was made in the year 1761, the Heir of Mr. *Pyott* can claim?—[His *Honor* here stated the contents of the Deed-poll]. The first objection that is made to the validity of this Appointment of the 14th April 1761, is that it appears that, before it was executed, there was some other Appointment made by a Deed-poll of the 20th of June 1760; and it is said that, because it does not appear what has become of that Deed-poll, and because it is impossible, if it does not appear, to be quite sure that that Deed-poll itself has been revoked by the Appointment of the 14th of April 1761, and because it might happen that, if it was not revoked, the Limitations contained in it would be utterly inconsistent with the Limitations contained in the Instrument of the 14th of April 1761, therefore, the instrument of the 14th of April 1761, cannot be considered as a valid Appointment. It appears to me that there is no foundation for that objection. Here we have an Instrument under hand and seal, solemnly made, expressly recognising the Instrument of June preceding, and formed for the express purpose of revoking that Instrument, and making new Limitations apparently inconsistent with it; and I apprehend that the very fact which comes out in Evidence, namely, that this Instrument of the 14th of April 1761, has been preserved, and was found with the Title-deeds relating to the Estates of Mrs. *Pyott*, contrasted with the fact that the Deed-poll, which was intended to be rendered null and inoperative by means of the Instrument of the 14th April 1761, is nowhere to be found, is a strong circumstance to fortify the presumption that the Instrument of the June preceding was made null and inoperative, and was destroyed because it had been made null and inoperative, and, therefore, of no value.

The Instrument, which was intended to be an operative Instrument, is preserved. The Instrument which was intended not to be operative, and to be null, has not been preserved; and I am asked, when I find something so clear and explicit as the intention of the Party, declared by the existing and forthcoming Instrument of the 14th April 1761, to pay no regard to it whatever, and to consider it as altogether inoperative, because a conjecture is made that the Power of Revocation reserved in the Deed of the June preceding, was not duly executed by this Instrument of the 14th April 1761, deliberately made for the purpose of revoking it. My opinion is, that I am bound to act, and must feel my judgment concluded by that which is plain and explicit, and that I cannot allow this Instrument, which apparently is a perfect and valid Instrument, to be set aside and overruled by a conjecture as to the contents of that Deed, which cannot be produced.

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Then it is said, with respect to the nature of this Instrument of the 14th April 1761, that it is to be considered as altogether a Testamentary Instrument, and not merely so, but that it is to be considered as an Instrument which was never intended to take any effect at all, except in the event of Mr. *Pyott* surviving Mrs. *Pyott*; and, if that was a right construction, then there would be an end of the question, as far as it is raised by the Instrument of the 14th April 1761. Now it is perfectly true that this Instrument does appoint a Life Estate to Mr. *Pyott*, in the event of his surviving his Wife. He could, by the terms of the Settlement, take an Interest for his Life no otherwise than by her Appointment; and, as she, by the Limitations of the Settlement, took the Life Estate in possession, he could take a Life Estate in Remainder only;

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and, therefore, I find that, when she has appointed the Life Estate to him, to take effect immediately after her death, she has intended to execute the Power which was given to her, to appoint the Life Estate to him after her death. But it is quite clear that, for the purpose of enabling him to take that Life Estate, he must survive her. But the Instrument goes further ; because she says, from and immediately after her death, in case she should leave any Child or Children by her Husband living at the time of her death, to her Husband for his natural Life ; and, after the decease of her Husband, she appointed the Premises to the Child or Children which she should leave, by her said Husband, living at the time of her death ; but, if she should leave no Children, by her Husband, living at the time of her death, then, from and immediately after her death, she appointed the same Premises unto the use of her Husband, his Heirs and Assigns for ever ; which, in the particular contingency which, in fact, did happen, of her leaving no Child or Children, by her Husband, living at the time of her death, was an immediate Appointment, to take effect from the execution of the Instrument, of the Fee Simple to the Husband : and, supposing that she had not made the Appointment to depend upon the fact of her not leaving Children living at her death, there is no doubt that, under this Instrument the Husband would, on the mere execution of it, have had in himself a vested Estate in reversion : but, inasmuch as the Estate appointed to him, is made to depend on the contingency of her not leaving Children living at her death, the only difference is that, immediately upon the execution of the Instrument, he had an absolute right to the Estate in reversion ; provided only, that future contingency happened, by means of which the Reversion would take effect in possession. It ap-

pears to me, therefore, that this is an Instrument which, with respect to the Reversion, had an immediate effect from the time of its execution.

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Then a question arises, what effect the Will has had upon this Instrument. Before I go to that, however, I must allude to another point, namely, the question whether this Instrument can be considered a valid Instrument with regard to the form of the Attestation. The Power given by the Settlement was a Power to appoint by any Writing or Writings under her hand and seal, attested by two or more credible Witnesses, or by her last Will and Testament, or any Writing purporting to be her last Will and Testament, to be by her signed and published in the presence of three or more credible Witnesses. The first observation that arises upon this, is that the Power which was executed, or which was intended to be executed, by the Instrument of the 14th April 1761, was not the Power which was given in the Settlement, but was the Power, whatever that Power was, which was contained in the Instrument of the June preceding; and it by no means follows, as a matter of course, that, when this Lady had once executed her Power of Appointment by the Instrument of June 1760, she reserved the Power of Revocation and new appointing, precisely in the same words as were expressed in the Settlement, which authorized the Appointment made by the Instrument of June (y). And, if any presumption was to be entertained, it would be presumed rather that this Instrument, which professes to be an execution of the Power of Revocation

(y) The Appointment made by the Deed-poll of April 1761, purports to be an execution of the Power reserved by the Settlement.

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contained in the Instrument of June preceding, was an Instrument which executed the Power reserved by the Instrument of June preceding, in the manner in which that Power was reserved; and it is a gratuitous assumption that has been taken in the course of the argument, that it is to be taken that the Power to be executed was the Power that is contained in the Settlement. But it is observable that this Lady, by the very Instrument which she executed in April 1761, has reserved to herself a Power of Revocation which in a great degree tallies with the Power which was reserved in the Settlement; and I think, therefore, that the fairest and the most satisfactory mode of considering the Case would be upon the supposition that the Power which was contained in the Instrument of June preceding, was a Power of Revocation corresponding with the Power that was contained in the Settlement. On that supposition then the Case should be considered. If it were so, why then the Power was to be executed by a Writing under her hand and seal, attested by two or more credible Witnesses. Now the Instrument that is produced, is an Instrument which appears to be signed by *Ann Pyott*, which has her seal, and which has an attestation in these words: "Sealed and delivered in the presence of," &c. Now the Statute that has been alluded to was passed in consequence of the Cases of *Wright v. Wakeford*, and *Doe v. Peach*. Before that Case of *Wright v. Wakeford* was decided, the Case of *Macqueen v. Farquhar* (z) had occurred; and there a Power had been reserved to a Person, by any Deed or Deeds, Writing or Writings, to be by him signed and sealed in the presence of two or more Witnesses, to appoint; and the Deed, which was intended to be

(z) 11 Ves. 467.

executed in pursuance of the Power, was a Deed, expressed, in the body, to be signed, sealed and executed in the presence of three credible Witnesses. Now the Witnesses who attested that Deed, are stated in the Indorsement of Attestation on the Deed, to attest the sealing and delivery only; and the question was, whether that was sufficient; for the Instrument was to be signed and sealed in the presence of two Witnesses, and the Attestation expressed that the Witnesses attested the sealing and delivery only; and Lord *Eldon* says: "The fact, in all probability, is that the Person who prepared the Attestation indorsed the ordinary words, not attending to the circumstance that the Party was doing the Act by this Deed purporting to be signed, sealed and executed in the presence of the Witnesses. Upon the question whether, after execution, it ought to be taken that he did sign in the presence of the Witnesses attesting the sealing and delivery, there would be a miscarriage in a Judge directing the Jury, if that fact was found, not to presume that the Deed was signed in the presence of the same Witnesses as it professed to be. The Attestation, therefore, is good." It is to be observed that there were no directions, in the Instrument which reserved the Power, as to any Attestation at all; but it was only directed that the Instrument should be signed and sealed in the presence of two or more Witnesses. After that Case, came the Case of *Wright v. Wakeford*: there the Power was given, to be executed with the consent of certain Persons, testified by Writing under their hands and seals, attested by two or more credible Witnesses and the Instrument which professed to be made in execution of the Power, appeared, on the face of it, to be signed and sealed and delivered; but the Attestation on the Deed, which was made at the time of the seal-

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ing and delivering of the Deed, was an Attestation to the facts of the sealing and delivery only: and, when the Case came before Lord Chancellor *Eldon*, he discussed it, and evidently was of opinion that the Attestation was not sufficient, because, according to his opinion, the proper meaning of the term "attest," was that the Witnesses should, by the written Attestation, give their evidence to the fact that the Instrument was signed, as well as sealed and delivered: and, although there could be no doubt, after what Lord *Eldon* had said in the Case of *Macqueen v. Farquhar*, if that rigid construction had not been put on the word "attest," and it had been left to any Jury to determine the fact, whether the Instrument was signed, as well as sealed and delivered, they would, without doubt, have held, or been directed by a Judge to hold that it was signed, as well as sealed and delivered: yet Lord *Eldon*, putting that severe construction on the term "attest," held that the Attestation was insufficient. But he sent it to the Court of Common Pleas; and, when the Case was argued in that Court, three of the Judges certified that the Attestation was bad, and that there was not a due Execution of the Power. *Mansfield*, C. J., who had for many years practised in a Court of Equity, and who was a very competent master both of Law as well as of Equity, stated that, in his opinion, the Instrument was perfectly good. Then came the Case of *Doe v. Peach*. In that Case there was a Power, by any Deed or Writing, Deeds or Writings, under the hands and seals of both Parties, to be by them duly executed in the presence of, and to be attested by two or more credible Witnesses. The Attestation to the execution of the Deed which professed to be an execution of the Power, related to the sealing and delivery of it only. On the Trial of an Ejectment, a Case

was reserved, and Lord *Ellenborough*, after the discussion of the Case, held, and the Court of King's Bench concurred with him, that the Attestation was not good, that it ought to have gone to the fact of signature, as well as of the sealing and delivery. That being the state of the Law, the 54th of the late King, C. 168, was passed. It is observable, on the face of that Act, that it was intended to be a remedial Act, for the purpose of obviating doubts which had arisen, and the Act itself expresses that it is expedient that the Titles of Purchasers and other Persons should not be disturbed. Now, by "Purchasers" are meant here, as I conceive, Persons who purchased by paying a valuable Consideration, and the words, "other Persons," mean all other Persons, Volunteers or others, who may be interested in such Instruments; and it is more likely that that was the Construction, because this question as often arises in the case of voluntary Appointments, under family Settlements, and merely family Instruments, as under Instruments by means of which a Purchaser for a valuable Consideration is to derive a Title. It appears to me, therefore, that Volunteers were meant to be protected by this Statute as completely as Purchasers for a valuable Consideration. In the second Section, there is a certain class of Instruments pointed out with respect to which the Act shall not have reference. The third Section has this Proviso: "That this Act shall not extend, &c." The terms, "Entry or Claim," were, I presume, meant to apply to the case of a legal Entry, and of a legal Claim. The terms, "Suit at Law or in Equity," explain themselves. Last of all come these general words: "or by any other legal or equitable means whatsoever." And, without doubt, there might be legal means, and certainly there might be equitable means, which would have the effect of avoid-

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ing an Instrument which was defective in regard to the Attestation. We therefore have to consider whether, in this Case, there have been any other legal or equitable means (for Entry there could not be, and Claim there was none, nor was there either a Suit at Law or in Equity) by which the Instrument has been avoided. Avoidance of the Instrument for the purpose of making it null, is quite a different thing from so dealing with the Fund, or a portion of the Fund, which is the subject of the Instrument, as to withdraw it from the operation of the Instrument, because the Instrument would have remained perfectly valid if a portion of the Fund had been altogether withdrawn from it by the acts of Strangers. Supposing that the Lands in the Settlement had not been sold, and the Title of the Settlers had been bad as to a portion of those Lands, and they had been evicted, without doubt that would have avoided the Instrument in a sense, for it would have withdrawn part of the Estate on which the Instrument was to operate; yet the operation of the Instrument would have remained unaffected as to the remainder.

It appears, by the *Master's* Report, that the Estates were sold in 1773, as to part, and, in 1795 and 1796, as to the remainder; and that, so late as the year 1800, an Instrument was executed which expressly recognised the existence of the Settlement, so far as the Fund mentioned in that Instrument was concerned. It appears that, in the Deed of January 1796, there was, in the strongest manner, a recognition of the existence of the Settlement; and the same thing appears with respect to the Instrument of 1773. I consider what appears on the face of these sealed Instruments, speaking language which has no ambiguity, and which the Parties were bound to speak, or at least expressing sentiments

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which they were bound to entertain, as of far greater importance than any loose expressions that may be found in any Letters that have been written either by Mr. *Pyott* or by Mrs. *Pyott*; and, supposing that the Letters were more clear than they are, they would, in my mind, be outweighed, a thousand times, by the language of the Deeds, especially when you advert to this circumstance, that the Power of Sale was so constructed (for I go entirely along with Mr. *Sugden's* argument on that point), as that the legal Estate would not, under the mere execution of the Power, vest in the Purchaser, unless it had subsequently happened that the Purchase-money was laid out in the purchase of Lands to be settled to the Uses of the sold Lands; I say, under the mere Power itself; because it appears that that difficulty would not have arisen in respect to the Purchaser; for the Trustees of the Settlement had got the legal Estate in Fee, therefore they could convey that, by their grant, exclusively of executing any Power; but still, in order to make the purchase good in Equity, the Purchaser had an Equity, as against the Vendors, to say: "lay out the Purchase-money which we have paid to you in the purchase of Lands, and settle it on the Uses and Trusts of the Settlement." Then I find that these Parties are, in the years 1773, 1796 and 1800, so dealing with each other, as to keep alive the necessity of complying with that duty which they owed to the Persons who had paid them the Purchase-money. It is quite clear that, down to the year 1800 at least, both Mr. and Mrs. *Pyott* did recognise the Settlement as affecting the Lands which had been in the Settlement, and the Purchase-moneys which had arisen from the sale of those Lands. The language in the Letters is ambiguous. The Letter written by Mr. *Pyott*, which was most

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relied on, had this expression in it: "I have the least Interest in it, as my life is not worth ten years purchase, and as the Estate will not go to my family." That Letter shows this only, that he was aware that the Estate would come to him for his life, but that he was not aware of the fact that it would vest in him on a particular event happening. It proves, therefore, to a certain extent, that his memory was affected by the circumstance that the Appointment had been made, giving the Life Estate to him, although his memory did not enable him to advert to the circumstance that he was to take the Reversion in the Estate: but, if I find that he is speaking of his Life Estate, I must suppose that he did, thereby, obscurely advert to the fact that there was a subsisting Appointment which had given him a Life Estate; and it only comes to this, that he was not aware, at the time he wrote the Letter, or at least did not summon to his mind, when he wrote that Letter, a full recollection, of all the Interest he might possibly derive under that Appointment. Then there is a Letter, written by Mrs. *Pyott*, in December 1814. This Letter states: "I will thank you to give me due notice, that I may determine what arrangement to make concerning the Mortgage I hold;" and it is asked that, from an expression so completely loose and indefinite as that is, the Court shall take it for granted that there was a deliberate purpose, on the part of Mrs. *Pyott*, to convert the Money on Mortgage, from the character of Real Estate (with which it then was impressed), into the character of Personalty. It appears to me that this affords far too slight a foundation for this Court to act on.

There is another Letter introduced, written by Mr. *Pyott* in May 1796, in which he says: "You are

welcome to the 300 *l.* paid by *Faussett* : but then you will remember to be punctual, as you know I have no Monies arising from the Sale but what is resettled." Can this be considered as a recognition by Mr. *Pyott*, in the month of May 1795, that the Money which was out on Mortgage was to be considered as Personalty, as Money not to be resettled? Is it any thing but a complete, direct recognition that there was a subsisting obligation to resettle that Money which was then out on Mortgage; and, therefore, without advert- ing to the other Letters, which were read by Mr. *Pepys*, and which, more or less, went to show that Mr. *Pyott* did consider that he had himself an Interest in the settled Estate, which he never had except by means of the Appointment, it is, in my mind, perfectly clear that, at the time when Mrs. *Pyott* made her Will, and at the time when she died, the character which the Money upon Mortgage sustained, as being impressed with a Trust to be laid out in the purchase of Real Estates to be settled to the uses of the Settlement, which com- prehended therefore whatever Interest might be given by the Appointment of April 1761, did remain.

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I shall now proceed to consider the next part of the Case, and that is, whether, in the Will, I can find any express words of Revocation and new Appointment, or any words which, by the most liberal construction that has ever been put upon them, have been or can be considered as revoking the Appointment of April 1761, and passing the Money either as Land or as Money. It is observable that Mrs. *Pyott* has, at the end of her Will, used these words : " Lastly, I do hereby revoke and make void," &c. Now have these words exercised the Power of Revocation, and made void the Appoint-

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ment? It appears to me that they have not. They evidently cannot mean that she revokes all Papers whatsoever, but the word "testamentary" must be taken as coupled with the word "Papers" as well as "Appointment." What she revoked, therefore, was all former Wills, and also all testamentary Appointments and Papers. It is not, however, every Instrument which passes an Interest that will not take effect in possession until the death of the Party, that can be legitimately called a "testamentary Instrument," or a "testamentary Appointment," or a "testamentary Paper." The Deed and Writing which was signed, sealed and delivered by Mrs. *Pyott*, professed to have its operation immediately. It immediately gave a Life Estate in the Property to her Husband, and immediately gave to him the whole Fee Simple, in the event of her dying without leaving children; and I cannot look at that Instrument as bearing any testamentary character whatever. It was attempted to be said that the Instrument must be considered as testamentary, because there is a Memorandum at the bottom of it, in which Mrs. *Pyott* gives some particular directions about her funeral. But I cannot allow that Memorandum to have any effect whatever on the Instrument; because there is no evidence of the time when it was written, and therefore I cannot connect it with the Appointment under which it is subscribed. It amounts then to no more than this: that, upon a Paper which gives a very large Estate to the Husband, which, though it could not be enjoyed by him unless he survived his Wife, gave him an Interest which he was capable of parting with if he did not survive her, there is a direction concerning her funeral. That is much too weak to justify me in holding that it has converted the Instrument itself into a testamentary Paper. I consider, therefore, that, by

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these words, this Lady has only expressed an intention to do that which is generally done by Persons making a Will, namely, by express words to revoke all former Instruments of the same nature, the production of which would militate with the intention expressed in the Will in which those words are contained. Then it is to be observed that, if I find, in this Will, an expressed intention to revoke all testamentary Appointments, and find no expression of an intention to revoke Appointments not testamentary, according to the rule, *expressio unius est exclusio alterius*, not only is the Appointment not affected by it, but it leaves an inference that that Appointment, which was not testamentary, was not intended to be revoked. When I come to the Devise, I find that, after giving certain Legacies and Annuities, this Lady gives to Mr. Loop, or his Assigns, a certain Cottage; and then she says: "As to my capital Messuage or Mansion-house, wherein I now live," &c. Now, adverting to what was the Freehold Property which this Lady could devise, is this Devise to be construed, of necessity, as a Devise operating at once as a revocation of the Power of Appointment, and making either a new Appointment, or passing that Interest in Fee Simple, in Equity, which the Testatrix had, provided she did not choose to execute her Power of Appointment?

There is no doubt that, for the purpose of construing a Will with regard to the question whether it is an execution of a Power, Courts are justified in regarding the nature of the Real Estate which the Person making the Will had at the time. In the Case of *Standen v. Standen*, (which was affirmed in the House of Lords,) there was a general Devise in these terms: "All the rest, residue and remainder of my Estate and Effects, of

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what nature or kind soever, and whether Real or Personal." And the question there was, whether a Power could be considered as well executed by those general words, having regard to the situation of the Testator's Property. As to the Real Estate, it was held, first of all in the Court of Chancery, and afterwards by the House of Lords, that the Power was well executed; and the same doctrine is also to be found in the Case of *Bennett v. Aburrow* (a), and which I refer to for the sake only of the very clear language in which Sir William Grant has expressed his view of the doctrine. He says: "Formerly it was sometimes required that there should be an express reference to the Power; but that is not necessary now. The intention may be collected from other circumstances, as that the Will includes something the Party had not otherwise than under the Power of Appointment; that a part of the Will would be wholly inoperative, unless applied to the Power." And that appears to be the correct and clear view of that part of the Law. I must, therefore, consider this Devise with a view to discover whether, for the purpose of giving effect to the particular, as well as the general words in it, this Property, which remained impressed with the character of Real Estate, was of necessity included.

The Lady, it appears, had her Mansion-house at *St. Martin's Hill*, with certain Offices and Gardens, and pieces of Pasture Ground and Shrubby, on one side of the Road, and, on the other side of the Road, there was a collection of Cottages, and, in the space between two of the Cottages, there was a circular plot of Ground, which apparently was used for the convenience of turning her Carriage. I entirely concur

(a) 8 Ves. 609.

with the Decision that was made, by the Court of King's Bench, in the Case of *Doę v. Collins*: but, in this Case, it appears that these Cottages were on the side of the Road opposite to the Messuage, and that they were not occupied by the Lady herself; on the contrary, it appears they were occupied by other persons; therefore, I cannot think that, under the words: "My capital Messuage or Mansion-house wherein I now live, and the Buildings, Gardens, Grounds and Appurtenances to the same belonging," the Cottages on the opposite side of the Road passed. Then follow the words "or therewith used," but they were not therewith used. Then come the words: "And all and singular other my Messuages, Lands, Tenements or Hereditaments, and all other my Real and Leasehold Estates whatsoever and wheresoever." The fair construction to be put on these words, is that they only meant to pass all other her Real Estate, especially when it appears, upon the face of the Will, that there was the Reversion in Fee of the Cottage which had been devised to Mr. *Loop* for his Life, and when it appears that there were other Cottages, and the piece of Land on the opposite side of the Road to which these words may be applied. I think that these words are merely to be taken as general words: and, therefore, my opinion is that, under these words of devise, that equitable Real Estate, which was not hers at the time she made her Will, but was her Husband's, (for unless this is taken to be a revoking of the Power, it was her Husband's), did not pass, and no intention can be collected, from these words, of revoking the Appointment and taking away from her Husband or his Heirs, that which was already vested in them by means of the Appointment of the 14th April 1761. Therefore, the Claim of the Devises must be set aside.

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The claim of the Residuary Legatees appears to me to be still weaker. It is settled that, for the purpose of determining as to the execution of a Power with respect to Personal Estate, you shall not be permitted to go into evidence of what the Estate was. The distinction is clearly recognised, not only by what took place in the Case of *Standen v. Standen*, but also in the Cases of *Jones v. Tucker*, and of *Jones v. Curry*. And it is observable that the question about the revocation of the Power can hardly be said to arise with respect to the Residuary Legatees; because the Residuary Legatees allege, not that there was not a Power, but that that which had been the subject of the Power had become Personal Estate, by the act either of Mr. and Mrs. *Pyott* jointly, or of Mrs. *Pyott* separately. Now, if so, and it was in the state and character of Personalty, it could not be subject to any Power at all, and therefore, the question about Power is altogether to be set aside. And then, thinking, as I do, that the Fund remained impressed with the character of Real Estate, can I adopt this construction which the Residuary Legatees ask for, namely, that the words which I am going to state, should be taken, not as an Execution of the Power, but as an explicit Declaration, on the part of Mrs. *Pyott*, that the character of Real Estate should depart from the Trust Fund, that the character of Personal Estate should be impressed upon it, and that then these very words should pass the Estate, so converted into Personalty, to the Residuary Legatees? The words are: "and as to all and singular my ready Money and Securities for Money," &c. It has been said that this sentence must be construed so as to pass the Property in question, because, although it appears, in evidence, that Mrs. *Pyott* had, at the time of making of her Will, Securities for Money, and Money in the Public Funds,

yet it does not appear that she had any Money standing in the name of a Trustee, except those Mortgage Funds which stood in the name of Mr. *Johnson* or Sir *Robert Johnson Eden*. It appears to be a visionary and wild exposition of words, which are so general in their nature, and which it is perfectly clear that the Testatrix used for the mere purpose of comprehending every thing which was her Personal Estate, to give them any construction which would turn, at once, Real into Personal Estate, and then pass it in that character. And therefore, my opinion is that the Instrument of the 14th April 1761 is now to be taken as a good Instrument, the defect in the Attestation being cured by the Statute; that it never was avoided; and that, therefore, it passed all that portion of the Fund which remained unconverted from the character of Real Estate, and vested the whole in Mr. *Pyott*, as a Reversion which would descend: and the only remaining question is, to whom did it descend?

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It has been said, on the part of the Gavelkind Heirs, that it must be considered that, inasmuch as part of the settled Property was Land in the County of *Kent*, the combined Fund which arose from the sale of the Gavelkind Lands in *Kent*, and of the Common Soccage Lands elsewhere, ought to be apportioned, and that it ought to be considered that the Trust to lay out the Purchase-money in the purchase of Lands, Tenements and Hereditaments being Freehold of Inheritance, created a right to have a portion laid out in the County of *Kent*. But it appears to me that that is perfectly fanciful. It is observable that it is not every species of Inheritance in the County of *Kent* which is held to be Gavelkind; because it has been expressly

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decided, in the Case of *Doe v. The Bishop of Llandaff* (b), that, where there was a Rectory which had been annexed to one of the greater Monasteries, which was afterwards dissolved, although the Lands belonging to the Rectory would descend according to the Gavelkind Law of *Kent*, yet that the Tithes would not; because the Tithes did not become Lay-fee until the time of H. 8; and, in order to make that which is a Freehold of Inheritance descend according to the law of *Kent*, it must have been Freehold of Inheritance, which could be presumed to have been such at the time of the Conquest. Am I then to be asked to decide that, under the general Trust to invest the Purchase-money in the purchase of other Freehold Lands of Inheritance, a Trust actually subsisted which Parties had a right to insist on, and which a Court of Equity would execute, to invest a Portion of this Purchase-money in Gavelkind Land? This, as I said before, appears to me to be perfectly fanciful, and my opinion, therefore, on the whole of this Case, is that Sir Robert Johnson Eden, who is the Heir at Law of Mr. Pyott, takes, by virtue of the Appointment, the three sums of 8,900*l.*, 1,000*l.* and 1,500*l.*, which at present have impressed on them the character of Freehold of Inheritance.

(b) 2 New Rep. 491.

END OF PART I.

CASES IN CHANCERY

BEFORE THE

VICE-CHANCELLOR.

WADE v. COOPE.

IN 1812, *John Brice*, the elder, being indebted, to the Defendant *Henry Twynam*, to the amount of 1,200 *l.* on balance of account, was required by *Twynam* to give Security for the Debt; upon which *Brice* proposed to give to *Twynam* three Bonds, each for 400 *l.* and Interest, the first to be executed by *Brice* and the Defendant *Coope*; the second, by *Brice* and the Defendant *William Rogers*; and the third, by *Brice* and one *Smith*. The two first of these Bonds were executed accordingly, and were dated the 5th of August 1812, and conditioned for payment on the 24th of December 1814; but *Smith* refused to execute the third Bond. In consequence of this, *Brice* agreed to give to *Twynam* a Mortgage for 1,000 *l.* upon his Estate in *Hampshire*, as a further Security for the Debt. Accordingly, by an Indenture, dated the 20th of August 1813, reciting that *Brice* was indebted to *Twynam* in 1,000 *l.* on balance of all accounts on that day settled between them; and that, in order to secure the payment of that Sum with Interest, *Brice* had agreed to demise the Estate to *Twynam* in manner

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Principal and
Surety.

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thereinafter mentioned; *Brice* demised it to *Twynam* for 1,000 years, by way of Mortgage, for securing the 1,000 *l.* and Interest. In the same month *Brice* executed a second Mortgage of the Premises to one *Covert*, for 500 years, for securing 500 *l.* and Interest. In October 1814 *Brice* borrowed 1,000 *l.* of the Plaintiff, out of which he redeemed *Covert's* Mortgage; and by an Indenture dated on the 15th of that month, mortgaged the Estate to the Plaintiff for 700 years, for securing the 1,000 *l.* and Interest. In 1817 *Brice* died, leaving the Defendant *John Brice* the younger, his eldest Son and Heir at Law. After *Brice's* death, *Twynam* required *Rogers* and *Coope* to pay him what was due on their respective Bonds. *Rogers* complied, but *Coope* refused; upon which *Twynam* commenced an Action against *Coope* upon the Bond in which the latter had joined. *Coope* then filed a Bill in the Court of Chancery against *Twynam* and the Personal Representatives and Heir of *Brice*, praying that the Bond might, for the reasons therein stated, be delivered up to him to be cancelled; that an account might be taken of the Rents of the mortgaged Estate received by *Twynam*, and the amount be declared to have been received in satisfaction of the Bond Debt; that the Estate might be sold if necessary, and the proceeds applied in satisfaction of the remainder of the Debt; and for an Injunction to restrain the prosecution of the Action. *Coope* applied for the Injunction, but without success; and *Twynam* recovered, in the Action, the full amount of his Debt and Costs. An Order was afterwards made in the Suit, that *Coope* should be at liberty to pay to *Twynam* the Balance due on the Mortgage; and that thereupon *Twynam* should deposit the Title-deeds in the Master's Office.

In pursuance of this Order, *Coope* paid 636*l.* to *Twynam*. In October 1826, *Brice* the younger sold his Equity of Redemption in the mortgaged Estate to the Plaintiff; and, on the 26th of that month, conveyed it to the Defendant *George Twynam*, in trust for the Plaintiff, who entered into possession.

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The Bill in this Cause insisted that the Plaintiff *Wade* was entitled to the benefit of his Mortgage, and to redeem the first Mortgage in preference to *Coope*, who had no Lien on the Premises in respect of his Bond, inasmuch as the first Mortgage was a distinct transaction, subsequent to and independent of the Bond; and it prayed that the Plaintiff might be let in to redeem that Mortgage upon payment, to *Coope*, of what remained due upon it.

Coope, in his Answer, contended that the conveyance, of the Equity of Redemption, to the Plaintiff, was void as against him; because it was taken with full knowledge of the existence of the first Suit, and of his claims, as a Specialty Creditor of *Brice* the elder, in respect of the Bond, and that *Wade* was not entitled to redeem the first Mortgage upon the terms stated in his Bill, but that, inasmuch as the giving of the Bonds, and the making of that Mortgage were but one transaction, and were given as Securities for one and the same Debt, he, *Coope*, as a surety for *Brice* the elder, was entitled to the benefit of the Mortgage, to the full extent of the Principal and Interest thereby secured, in satisfaction of the Money recovered from him on his Bond, and that he had a Lien on the mortgaged Premises to that extent, and was also entitled to be paid thereout the sum which he had paid to *Henry Twynam* under the

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Order made in the first Suit ; that *Wade* was not entitled to receive any benefit from the mortgaged Premises, until the whole of the Principal and Interest secured by the Indenture of the 20th of August 1813 should have been paid ; and that he, *Coope*, was entitled, as a Surety for *Brice*, to stand in *Henry Twynam's* place, and to have all the Securities, held by *Twynam*, given up for his benefit.

Mr. *Sugden*, and Mr. *Romilly*, for the Plaintiff
Wade :—

The Mortgage to *Henry Twynam* was not made until a year after the Bonds were executed. It has never been decided that a Surety in a prior transaction between Debtor and Creditor, can claim the benefit of Securities given in a subsequent transaction. It appears, from *Copis v. Middleton (a)*, that the Surety is entitled to stand as a simple contract Creditor only of the Principal ; and Lord *Eldon*, C. limits the rule to its being part of the same transaction. The Mortgage to *Twynam* is independent of any question of Suretyship. Then there is the Mortgage to *Wade*. He says that, *Twynam's* Mortgage being reduced by payments, he claims to redeem it, on payment of the reduced Sum. *Coope* claims to be Mortgagee, and contends that *Wade* is not entitled to the benefit of the payments. But, in whatever way a prior Mortgage is paid off, the second Mortgage is let in. Unless the first Mortgage is kept on foot, it cannot be set up against the second Mortgagee. *Coope* is attempting to tack his Bond to the Mortgage, so as to exclude the second Mortgagee. The Bonds were not given for securing one entire sum of

(a) 1 Turn. 224. See 231.

Money, but each for a separate Sum (b). *Ex parte Rushforth* (b), *Wright v. Morley* (c).

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Mr. *Heald*, and Mr. *Koe*, for the Defendant
Coope:—

It appears, upon the face of the Bill, that the Mortgage and Bonds were one transaction; for it is stated that, in consequence of *Smith's* refusing to execute the third Bond, *Brice* agreed to execute the Mortgage to *Henry Twynam*: "as a further Security for the said Debt of 1,200*l.*" It has never been decided that a Surety is not entitled to the benefit of an additional Security obtained by the Creditor, though at a subsequent time, provided it be for the same Debt.

Mr. *Girdlestone*, Mr. *Wray* and Mr. *J. Romilly* appeared for the other Parties.

- The VICE-CHANCELLOR:—

The question that arises in this Cause is, whether it can be considered that the Defendant *Coope*, by having paid off the Bond, has acquired a Lien on the Real Estate of *Brice* the original Debtor; or, to put it in other terms, has a right to avail himself of the Security given by *Brice* to *Twynam*.

Now the Bill puts the Plaintiff's case entirely on this point, namely, that the Mortgage given to *Twynam* is a separate transaction from the transaction relating to the Bond; for it charges that the Mortgage to *Twynam* was a distinct transaction, subsequent in point of time and independent of the said Bond.

(b) 10 Ves. 409.

(c) 11 Ves. 12.

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v.
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Now it is attempted to be argued that it was not a distinct transaction; because it related to the same Debt: and that was the only way in which it was possible to maintain the Case as against *Wade*. It appears to be made out, most distinctly, that the Bond was given in respect of one part of the old Debt, and the Mortgage in respect of another part of it.

The Bonds and the Mortgage were, in one sense, given in respect of the same Debt, though they were, in fact, given for different parts of the same Debt, and were, altogether, distinct and separate transactions. The doctrine laid down by Lord Chancellor *Eldon*, in the Case of *Mayhew v. Crickett* (*d*), not then for the first time, but the result of a long series of Cases is, that, where a man becomes the Surety for a Debtor for the payment of a Debt, he has, if he pays the Debt, a right to avail himself of all the Securities which the Creditor has. But that doctrine never applies to a person who becomes Surety at one time, and a Security is given, to the same Creditor, either for another Debt, or, what is the same thing, for a distinct portion of the Debt for which the first Security was given. I have not found any such Case: on the contrary, all the notion I have of the Law is that the doctrine has always been stinted to the particular contingency of the Debt being one, and the Security being given for the same Debt, at the time when the Person became Surety for it.

It appears to me that *Wade* has made out his right to redeem; and that this right is not affected by the transaction; because a right to redeem he certainly had, standing in the situation of second Mortgagee.

(*d*) 2 Swanst. 185.

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The 636*l.* paid by *Coope* to *Twynam* must, of course, be repaid by *Wade* to *Coope*. So much of that Sum as consisted of Principal will, of course, carry Interest, and therefore Interest must be paid also upon that Sum or the part of that Sum which carries Interest: and it appears to me that *Wade* must have a Decree, as against *Coope*, with Costs.

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 v.
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NYE v. MOSELEY.

1828.
 16th January.

A REPORT of this Case, as it came before the Court upon the argument of a Demurrer, will be found in 1 Sim. & Stu. p. 61 (*a*). The Cause was afterwards heard; and, at the hearing, the Court directed a Case to be stated for the opinion of the Court of K. B. See 6 *Barn. & Cres.* 133. On this day the Cause came on to be heard for further directions; upon which occasion the Defendant was ordered to execute a new Bond with a Condition similar to that of the former one, and to pay the Costs of the Suit and of the Case at Law.

(*a*) This Case is reported under the Names of *Knye v. Moore*.

1828.
17th January.

*Mortmain.
Charity.*

A Bequest of
a sum of Money
to pay off a Debt
secured, by an
equitable Charge
only, upon a
Meeting-house,
is void.

WATERHOUSE v. HOLMES.

BETTY AMBLER, by her Will, dated the 23d of October 1820, gave all her Personal Estate to *Thomas Holmes* and *William Nicholson*, upon trust, amongst other things, to pay thereout the sum of 400 *l.* to the Trustees or Treasurer for the time being of the Methodist Meeting-house at *Baildon*, in the county of *York*, to be applied, in the first place, for and towards the paying off and discharging any Debt, or Sum or Sums of Money which might be due or owing upon the said Meeting-house at the time of her decease, and the Overplus, if any, to be applied to such other purposes of the said Meeting-house as the Trustees or Treasurer for the time being should, in their discretion, see fit. The Testatrix died on the 7th of December 1820.

The following facts were found by the *Master*, in pursuance of a Reference, made to him by the Decree, to inquire and state whether, at the death of the Testatrix, there was any and what Debt upon the Meeting-house.

The Meeting-house, and the Land on which it was built, had been paid for out of a Fund raised by subscription; and, by an Indenture dated the 18th of May 1807, the person of whom the Land was purchased, conveyed it to Trustees, who were the Subscribers of the Fund, and who were thereby empowered to choose a Treasurer, who was to receive all the Seat Rents and other Emoluments arising from the Chapel, which were to be applied in paying the Principal and Interest of all Monies

due on the Chapel and Premises, and in keeping them in repair: and the Trustees were also empowered, after the Interest of the Monies so due should have been paid, to allow all or any part of the Surplus for the support of the Preacher, and, if necessary, to mortgage the Premises till the Debt contracted should be reduced as far as they should judge expedient. At the Testatrix's death there was a Debt of 439*l.* 12*s.* 7*d.* due upon the Meeting-house to the Subscribers, and that Debt still remained unpaid. The Subscribers claimed to have a lien on the Title Deeds of the Meeting-house, (which were in their possession), and to be equitable Mortgagees thereof, for the amounts of their respective Subscriptions; but there was no other Debt affecting the Meeting-house.

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v.
HOLMES.

The Cause now came on for further directions.

Mr. *Cooper* and Mr. *Harrison Batley*, for the Residuary Legatees under the Will, contended that the Bequest of the 400*l.* was void under 9 G. 2, c. 36. and cited *Corbyn v. French* (a).

Mr. *Bickersteth* for the Treasurer of the Meeting-house :—

The Master has not found that the Debt was a charge upon the Meeting-house, but merely that the Subscribers conceived that they had an equitable lien on the Title Deeds. The third section of the Act does not apply in this Case, for it relates to charges on Lands and not on Title Deeds. Next, the Will gives to the Trustees a discretionary power to apply so much of the

(a) 4 Ves. 418.

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Legacy as should not be required for discharging the Debt on the Meeting-house, to other purposes connected with it, which are not within the statute; and if no part of the Legacy is required to pay the Debt, then the whole is Overplus. The Act applies to legal Interests only: but, if equitable Interests also are within it, then the discretionary power given to the Trustees entitles them to be paid the Legacy.

The VICE-CHANCELLOR:—

The option is given in the event only of there being no Debt on the Meeting-house. The Report finds, expressly, that there is such a Debt. There is no substantial difference between a legal and an equitable Mortgage. If it were otherwise, a Mortgage after a Mortgage in fee would not be within the Statute. My opinion, therefore, is, that this Bequest is void.

RIPLEY v. WOODS.

1828.
26th January.

*Husband and
Wife.
Chose in Action.*

A TESTATOR bequeathed a fourth part of the residue of his Personal Estate to his Daughter, the Plaintiff's Wife, after the death of his Widow, to whom a Life Interest was given. The Testator died in 1807. In November 1816, the Plaintiff and his Wife assigned their interest in the Testator's Estate to *Nancy Pugh*, for securing 1,000*l.* lent by her to the Plaintiff. In January 1817 the Plaintiff became Bankrupt, and, in the November following, he obtained his Certificate. In July 1821, the Testator's Widow died. In October of the same year the Plaintiff's Wife died; he obtained Administration to her, and filed the Bill, claiming to be entitled to the fourth share of the Personalty bequeathed to his Wife. The Plaintiff's Assignees were Defendants, as were also the Assignees of *Nancy Pugh*, who had, in the mean time, become Bankrupt.

A Man whose Wife was entitled to Personalty, subject to a Life-interest in *A.* becomes bankrupt, and afterwards obtains his Certificate; then *A.* dies, and afterwards the Wife, and the Husband takes out Administration to her; held, that his Assignees are nevertheless entitled to the Property.

Mr. *Bickersteth* and Mr. *Duckworth*, for the Plaintiff.

The question is, whether the interest of the Plaintiff's Wife passed, by the Assignment, to his Assignees. At the time of the Bankruptcy the Wife had a reversionary right to her share, subject to the Life-Interest of her Mother. It could not be then reduced into possession. How was it to pass to the Assignees? The Husband had nothing that was then capable of being sold. The Wife died after her Husband had obtained his Certificate. It was by virtue of the Administration that he acquired the right, which he now has, to the possession of the Fund. How could the Assignees be en-

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titled to receive that which he became entitled to long after obtaining his Certificate? *Purdew v. Jackson (a)*, *Hornsby v. Lee (b)*, *Honner v. Morton (c)*.

Mr. *Pepys*, and Mr. *Spence*, for the Husband's Assignees :—

At the Bankruptcy, the Husband's interest might or might not come into possession. Whatever a Bankrupt has or may have, passes by the Assignment. Here he had a possibility or chance. The Assignees might have sold the chance, whatever it might be, that the Husband had of becoming entitled. In the Cases referred to, the question was, whether the Husband could defeat, by Assignment, his Wife's chance of becoming entitled by Survivorship. We do not dispute the Husband's right to receive the Property, but whether he is entitled to retain it.

Mr. *Bickersteth*, in Reply :—

The Plaintiff stands in the situation of the legal personal Representative of his Wife, who was entitled to the Fund, in possession, at the time of her death. The Plaintiff insists upon his legal right: could his Assignees have made out any Title to it? How could they have shown that they would ever have a vested right in possession? Sir *Thomas Plumer*, M. R. in delivering his judgment in *Purdew v. Jackson*, says: "Another fallacy," &c. (*d*).

Mr. *Sugden*, and Mr. *Jacob* for the other Defendants.

(a) 1 Russ. 1.

(b) 2 Madd. 16.

(c) 3 Russ. 65.

(d) See 1 Russ. 59, 60.

The VICE-CHANCELLOR:—

My opinion is that the Assignees of the Husband are the persons entitled to the Fund in dispute.

The Husband, by the Marriage, had an incipient right to that Chose in Action which would become vested in his Wife, if she survived her Mother: and, as that event happened, it became vested in her, by means of which the Husband could reduce it into possession. The Husband, therefore, had, at his Bankruptcy, an incipient right which was capable of being passed by the Assignment (e).

(e) See next Case.

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v.
WOODS.

PIERCE v. THORNELY.

4th February.

THOMAS BROMILOW, by his Will, dated the 1st of January 1798, bequeathed certain Household Goods and other Articles to his Wife, *Margaret*, and his Daughter, *Jane Butler*. And, after reciting that he was seised, to him and his Heirs, of and in certain Freehold, Copyhold and Customary Messuages and other Hereditaments, he devised, unto his Nephew, *Robert Mollineux* and *William Thornely*, their Heirs and Assigns, all the said Hereditaments and Premises, with their Appurtenances, as well Copyhold as Freehold, along with the residue of his Personal Estate, which he thereby directed the Trustees to place out at Interest on Real or Government Security, and to apply the Interest in the same manner as was directed for the appli-

*Baron & Feme.
Chose in Action.*

The Husband of a Woman, having a vested Interest in possession in a Legacy, becomes Bankrupt; his Assignee files a Bill against the Testator's Executors, to compel payment of the Legacy, and soon afterwards the Husband dies: Held, that the Widow, and not the Assignee, is entitled to the Legacy.

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cation of the Rents and Profits of his Real Estates, upon the several Trusts therein mentioned concerning the same; (that is to say) upon trust to sell and let the said Messuages, Lands and Premises for the life of his Daughter, *Jane Butler*; and, if her Husband *William Butler* should survive her, to let the whole of the Premises, and to receive the Rents and Profits thereof upon the Trusts therein mentioned; (that is to say) in trust thereout, as well as out of the Interest of the Testator's Personal Estate, to pay to his Wife, *Margaret*, for her Life, an Annuity of 100*l.*; and then in trust to pay the Residue thereof to his Daughter, *Jane Butler*; and, after his Wife's decease, to apply her Annuity unto his Daughter; and, after her decease, to divide the same, as well as all his Real and Personal Estate, equally amongst all the Children of his Daughter who should attain the age of twenty-one years, except his Grandson *Thomas*, until they should each of them have received from it 800*l.* a-piece, if it would so far extend; and, in case there should remain any surplus after they had received their 800*l.* a-piece, then the Testator directed such surplus money to be equally divided amongst all the Children of his Daughter who should attain the age of twenty-one, and the Issue of such of them as should be then dead; such Issue to take the Parent's share: but, if his Daughter *Jane* should die in the life-time of her Husband *W. Butler*, without leaving any Issue, or such Issue should die under age, unmarried and without Issue, then the Testator empowered the Trustees to sell any part of his Copyhold Estates, if they should judge it best for the interest of his Daughter and her Heirs, putting the Money arising from the Sale out on Real or Government Securities, for the purpose before mentioned: and he appointed *Robert*

Mollineux and *William Thornely* Executors and Trustees of his Will.

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Thomas Bromilow died soon after making his Will, leaving his Wife, *Margaret Bromilow*, and his Daughter, *Jane Butler*, him surviving. *Robert Mollineux* died almost immediately after the decease of the Testator, leaving *William Thornely* him surviving, who alone, on the 10th of September 1799, proved the Will and accepted the Trusts thereof, and, soon after the death of the Testator, entered into the possession or receipt of the Rents and Profits of his Real Estate, and applied them and the Interest of the residue of the Personal Estate as directed by his Will, until the death of the Testator's Daughter, *Jane Butler*; and, after her death, he sold the whole of the Real Estates, and received the Monies arising therefrom, and the Rents which accrued in the mean time, and the Interest which subsequently accrued on such Monies and the Securities in which the same were invested, and he also received the Interest on the clear residue of the Testator's Personal Estate. The funds so received were much more than sufficient to answer the Legacies of 800*l.* directed to be paid and deducted thereout, in the first instance, for the benefit of the younger Children of *Jane Butler*.

Margaret Bromilow died in March 1812, and *Jane Butler*, in June of the same year, leaving *Eliza Jane Butler*, and five other Children, her surviving. *Eliza Jane Butler* attained the age of twenty-one in 1817; and she, at the time when the Bill was filed, was the Wife of *Ambrose Wilkinson*. *James Butler*, one of the Children, died an Infant; but the youngest of the survivors attained the age of twenty-one years in 1824.

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The Bill, after stating that, in 1817, *Ambrose Wilkinson* married *Eliza Jane Butler*, alleged that, thereupon, he became entitled, in right of his Wife, to the Legacy of 800 *l.* given to her by the Will of the Testator, with Interest from the time she became of age, and to one fifth part of the residuary Real and Personal Estates of the Testator and the produce thereof, and the Rents and Interest received therefrom since the death of *Jane Butler*. The Bill then stated, that, on the 20th of September 1820, a commission of Bankrupt was issued against *Ambrose Wilkinson*, and that the Plaintiff was chosen Assignee of his Estate: that at the time of the Bankruptcy the whole of the Legacy of 800 *l.* and Interest, and the fifth Share of *Ambrose Wilkinson*, in right of his Wife, in the residuary Real and Personal Estates, and the Rents, Interest and Produce thereof respectively remained due, with the exception of several small sums, not exceeding in the whole 217 *l.* 10 *s.*, which it was alleged had been previously paid to her or her Husband. The Bill charged that, by an account of the residuary Real and Personal Estates, and the produce thereof, rendered to the Plaintiff by *William Thornely*, and made up by him, on the occasion, or to the time of *William Robert Mollineux Butler* (the youngest of the surviving Children of *Jane Butler*) attaining his age of twenty-one years, the amount thereof, without deducting the Legacies of 800 *l.* given to the younger Children of *Jane Butler*, was stated at the sum of 4,355 *l.* 4 *s.* 4 *d.*; but that, in such account, no allowance was made for Interest, to the younger Children, on their Legacies of 800 *l.*, from the time they respectively attained the age of twenty-one years, which the Plaintiff submitted ought to have been

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allowed and deducted : that the Plaintiff had always been ready to allow a fair and proper proportion of the Legacy and Share to be settled on *Eliza Jane Wilkinson*. The Bill prayed that it might be declared that the Plaintiff, as Assignee of *Wilkinson's* Estate, was entitled to the Legacy of 800*l.* to which *Wilkinson*, in right of his Wife, became entitled, with Interest from the time she attained the age of twenty-one years, and also to one fifth part or share to which he, in right of his Wife, became entitled in the residuary Real and Personal Estate of the Testator, and the Produce thereof, and the Interest received and accrued on account thereof since the death of *Jane Butler*, after deducting what should appear to have been paid in respect thereof previous to the Bankruptcy, and subject to a proper Settlement thereout on *Eliza Jane Wilkinson*; and, if necessary, that the usual accounts might be taken of the Testator's Real and Personal Estates; and that the clear residue, after deducting the Legacies of 800*l.* and the Interest which accrued thereon, might be ascertained: and that, in taking such account, *William Thornely* might be charged with Interest, from the decease of *Jane Butler*, on the Share of *Ambrose Wilkinson*, in right of his Wife, in such parts of the Monies and Estates as should have remained in his hands uninvested, and that he might be decreed to pay what should be found due from him in respect of the Legacy of 800*l.* and Interest, and of the Share in the residue, after deducting what should appear to have been paid by him in respect thereof before the Bankruptcy; and that, if necessary, it might be referred to the *Master* to approve of a proper Settlement, out of the Legacy and Share, on *Eliza Jane Wilkinson*, and that the Legacy and Interest and Share in the residuary

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Real and Personal Estate, and the Produce thereof, subject to the deductions aforesaid, might be paid to the Plaintiff.

The Widow, and Defendant *Thornely*, put in a Plea stating that the Bankrupt had died since the filing of the Bill.

Mr. *Booth*, in support of the Plea :—

It is not, I understand, intended to object to the form of the Plea. The question is, whether in this Case there is anything to bar the right of the Wife to the *Chose in Action*. It is now established that the Assignment in Bankruptcy does not bar the right of the Wife. *Gayner v. Wilkinson* (*f*), *Mitford v. Mitford* (*g*). The same doctrine is recognized by Sir *Thomas Plumer*, M. R. in *Purdew v. Jackson* (*h*). There is nothing to distinguish this Case, except the circumstance of the Bill having been filed before the Husband died. But, if the Husband had died after a Decree had been made for payment to him, the Wife's right by Survivorship would not have been affected. *Nanny v. Martin* (*i*). So that in this Case we are clearly entitled to have the Plea allowed.

Mr. *Walker*, for the Plaintiff:—

The Plaintiff is entitled to the Wife's Legacy and Share of residue, subject to her Equity for a Settlement. The Assignment in Bankruptcy bars the Wife's right of Survivorship to an equitable *Chose in Action*,

(*f*) 1 Bro. C. C. 49.
(*g*) 9 Ves. 87.

(*h*) See 1 Russ. 53.
(*i*) 1 Ch. Ca. 27.

which was immediately recoverable: or, if it does not, the Assignment and a Suit instituted for the purpose of recovering the *Chose in Action*, will have that effect. No Case has been cited in which it has been decided that the Assignment had not this effect, if the Fund was immediately recoverable. The question as to its operation, notwithstanding what is said by Sir *William Grant* in *Mitford v. Mitford*, is not settled: and, in the late Case of *Purdew v. Jackson*, Sir *Thomas Plumer* considers such an Assignment as equivalent to one for valuable Consideration (*k*). It is not necessary in this Case to decide what is the effect of the Assignment on the Wife's legal *Chose in Action*: but, unless a different rule is to be applied to equitable *Choses in Action*, *Miles v. Williams* (*l*), and *Pringle v. Hodgson* (*m*), are Authorities that the right of Survivorship is barred. This Case may be decided on a narrower ground. An Assignment of the Wife's equitable *Chose in Action* immediately recoverable, for valuable Consideration, bars her right of Survivorship; and an Assignment in Bankruptcy, on principle and authority, has the same effect. *Bates v. Dandy* (*n*), and *Earl of Salisbury v. Newton* (*o*), are decisive Authorities for the right of an Assignee for valuable Consideration. Sir *Thomas Plumer* admits it in *Johnson v. Johnson* (*p*): and the late Cases on the Husband's Assignment of reversionary *Choses in Action*, proceeding on the distinction of their not, on that account, being reducible into possession, are Authorities to the same effect. The Assignment in Bankruptcy has the same operation. Where the *Chose in Action* is immediately

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(*k*) See 1 Russ. 27. 53.

(*l*) 1 P. Wms. 249.

(*m*) 3 Ves. 617.

(*n*) 2 Atk. 207.

(*o*) 1 Eden, 371.

(*p*) 1 Jac. & Walk. 476.

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recoverable, it changes the property; it is an interest which the Bankrupt might release. The whole argument in *Mitford v. Mitford* (q) rests on two propositions, that the Assignment passes the Property in the same plight and condition as the Bankrupt possessed it, and that the Assignees are mere volunteers. The first is not true, without this qualification, except as far as it is operated on by the Assignment. The question respecting the effect of the Assignment, still remains. But that the Property does not pass in the same plight, may be illustrated by the Case of a Joint-tenant becoming a Bankrupt; the Assignees do not become Joint-tenants with his companion: the Joint-tenancy is severed by the Assignment. The Assignees are not volunteers. Independently of the extensive words in the Bankrupt Act, the Debts form a sufficient consideration: if they were mere volunteers, they could not maintain a Suit in Equity; this Court never giving effect to an Assignment purely voluntary. The practical inconvenience of a contrary doctrine is an important consideration. It would, in that case, be the duty of the Assignees immediately to sell the *Chose in Action*, in order to guard against the accident of the Husband's death; and, as the extent of the Wife's Equity is well settled, there would be no difficulty in finding a Purchaser. This circuitry ought to be avoided. *Bosvil v. Brander* (r), and the opinions of Lord Henley in *Earl of Salisbury v. Newton*, and Sir Thomas Plumer in *Purdew v. Jackson*, are strong Authorities in favour of an Assignment in Bankruptcy standing, in this respect, on the same ground as one for a valuable consideration. In *Grey v. Kentish* (s) the Interest continued reversionary until

(q) See 9 Ves. 100. (r) 1 P. Wms. 458. (s) 1 Atk. 280.

after the death of the Husband; and in *Gayner v. Wilkinson*, *Saddington v. Kinsman*, and *Mitford v. Mitford*, the only Cases cited for the Defendants, it was reversionary at the time of the Bankruptcy; they are, therefore, clearly distinguishable from this Case, in which the Property was vested in possession, or recoverable, at the time of the Bankruptcy. In this Case the Property passed, subject, of course, to the Wife's Equity: in the others nothing could pass but the right to the Property: to bar the Wife's right of Survivorship, another Assignment, or some other act, was necessary after the death of the Tenant for Life. The same distinction prevailed in *Hornsby v. Lee* (t); in which Case Sir *Thomas Plumer* held that the Wife's right of Survivorship would prevail over an Assignment by the Husband for valuable Consideration of her reversionary *Chose in Action*, although the Tenant for Life died before the Husband: therefore, in deciding in favour of the Plaintiff, no Case will be overruled.

The commencement of the Suit fixes the right of the Assignees. The Decree must proceed on the rights of the parties as they originally stood. A contrary decision would lead to much inconvenience, and hold out an inducement to resort to trick and contrivance in order to retard the progress of the Suit. In *Steinmetz v. Haltin* (u), it was held that the Wife's Equity to a Settlement attached on the institution of the Suit; in other words, that the commencement of the Suit affected her Husband's legal right of Survivorship. It would not be fair to apply a different principle in the case of the Husband dying first: if his legal right is diminished, her's ought to be abridged to the same extent.

(t) 2 Madd. 16.

(u) See 1 Glyn & Jam. 68.

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At all events the Plaintiffs are entitled to the Interest of the Fund up to the time, if not beyond the period, of the Bankruptcy. The right to the Interest stands on a different ground: it is a breach of trust in the Trustees not to pay it to the Husband. A Court of Equity always gives him the Interest of his Wife's Fortune, provided he maintains her. *Macaulay v. Phillips* (x).

The VICE-CHANCELLOR:—

By the Will of *Thomas Bromilow*, who died about 1798, Freehold and Copyhold Estates, and residue of Personal Estate, were given to *Mollineux*, deceased, and the Defendant *Thornely*, upon trust to sell, and invest the produce in Securities, in trust for his Daughter, *Jane Butler*, for her Life; then to pay Legacies of 800 *l.* to all her Children who should attain the age of twenty-one years, and the surplus to go to all her Children who should attain twenty-one.

In 1799 the Will was proved by *Thornely* alone.

Jane Butler died in June 1812, leaving six Children. *Eliza Jane*, one of them, attained twenty-one in 1817. After *Jane Butler*'s death the Real Estates were sold and the Produce invested. In 1817, *Eliza Jane* married *Ambrose Wilkinson*. On the 20th September 1820, a Commission of Bankruptcy was issued against him, and the Plaintiff became his Assignee. On the 2d of May 1827 the Bill was filed by the Plaintiff, against *Thornely* and the Bankrupt and his Wife, for payment of *Eliza Jane*'s Legacy and Share of Residue. On the 18th June 1827 the Bankrupt died. *Thornely* and the Widow plead that fact: and the question is, whether the Plaintiff

(x) 4 Ves. 15.

is entitled to any part of the Wife's Legacy and Share of Residue, or to any of the Interest due, the Plaintiff's Title being as Assignee of a Bankrupt, and the *Chose in Action* having vested in Possession before the Bill was filed.

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If a Debt were due to a woman, *dum sola*, and she married, her Husband, by bringing an Action in the names of himself and his Wife, might recover judgment in the names of himself and his Wife; and, by taking out execution, might alone receive the amount of the Debt, and so acquire possession of his Wife's *Chose in Action*. But if, at any time before taking out execution, he should die, and the Wife survive him, she would be entitled to the benefit of the Action; and, if it had proceeded to Judgment, would be entitled to take out execution for her own benefit. That this is the rule at Law, and that the same rule is adopted in Equity, appears from the Case of *Nanny v. Martin* (y), where Baron and Feme had a Decree for Money in the right of the Wife, and then the Baron died. The question was moved, who should have the benefit of the Decree, the Wife or the Executor of the Husband? The Case being referred to C. J. *Hide*, he had given his opinion that the benefit of the Decree belongs to the Wife, and that it was so in a Judgment at Law; and, exception being taken to that Certificate of the Judge, he refused to hear the matter of the Exception, but left it to the Chancellor, declaring that his Opinion still was the same; and, at the Seal, the Lord Chancellor would not refer it back, but confirmed the Judge's Certificate.

(y) 1 Ch. Ca. 27.

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If the Husband of the Wife, who had a Debt due to her *dum sola*, had become Bankrupt, the Assignees could not recover payment of the Debt without bringing an Action in their own names and the name of the Wife jointly; for, by the Commissioners' Assignment they take an interest in the Debt in the same manner as the Husband had it; and if, after proceeding in the Action, and before execution levied, the Husband died, at Law the *Chose in Action* would survive to the Wife, and she might release the Action, as a Co-plaintiff, or release the Debt, as entitled to it by Survivorship. At Law, the Wife's *Chose in Action* could be recovered only in an Action in which she was made Co-plaintiff with her Husband, or with his Assignees, in case he became a Bankrupt. If the *Chose in Action* were equitable, the Wife is not of necessity to be made a Co-plaintiff—she must be a Party to the Suit. This was decided in *Clarke v. Lord Angier* (z): but she may be either a Defendant or a Co-plaintiff. At Law, where Judgment had been recovered by the Husband and Wife, the Husband alone could levy execution: but a Court of Equity will not, unless the Wife consents, permit the Husband to recover the whole of his Wife's *Chose in Action*, but will require a Settlement to be made upon her. In so doing, a Court of Equity not only recognizes the legal principle, that the Wife might be entitled by Survivorship, but acts upon it for her benefit in a manner which a Court of Law cannot do.

If these things be so, it is impossible to understand how, where the Wife has an equitable *Chose in Action*,

(z) 1 Ch. Ca. 41.

the Assignment in Bankruptcy can pass to her Husband's Assignees a larger right, or better title than the Husband himself had. Sir *Thomas Plumer*, in the conclusion of his Judgment, in *Purdew v. Jackson (a)*, says: "After this repeated consideration of the subject, I still continue of opinion, that all Assignments, made by the Husband, of the Wife's outstanding Personal Chattel, which is not, or cannot be then reduced into possession, whether the Assignment be in Bankruptcy, or under the Insolvent Acts, or to Trustees for payment of Debts, or to a Purchaser for valuable consideration, pass only the Interest which the Husband has, subject to the Wife's legal right of Survivorship." In the present Case, the Plaintiff claims, merely as Assignee in Bankruptcy, the Wife's equitable, outstanding Personal Chattel, which is not reduced into possession, and, therefore, according to Sir *Thomas Plumer*, can only claim it, subject to the Wife's legal right of Survivorship. In the Case of *Gayner v. Wilkinson*, cited in the note to *Saddington v. Kinsman (b)*, *Mary Pierson* was entitled to a reversionary Legacy, expectant on her Father's Death. Her Husband became Bankrupt: and then the Father died, whereby the Legacy vested in possession in the Life-time of the Husband. Then he died, leaving *Mary Pierson* surviving. The Assignees filed a Bill for the Legacy; and the Chancellor dismissed it. That, therefore, is a Case directly in point. Lord *Thurlow*, in the course of the argument in *Saddington v. Kinsman*, asked whether the Counsel knew any Case that, in point, contradicts *Gayner v. Wilkinson*, himself not recollecting any. In the Case of *Mitford v. Mitford (c)* it is observable that *Charlotte Mitford* married in 1799;

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(a) 1 Russ. 70. (b) 1 Bro. C. C. 50. (c) 9 Ves. 87.

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but *Robert Mitford*, the Bankrupt, did not die till 1790; therefore, in that Case, as in *Gayner v. Wilkinson*, his Wife's Legacy vested in possession before his death: and Sir *William Grant* held that *Robert Mitford's* Wife, who survived him, was entitled to her Legacy, as against the Assignees of her Husband. In his Judgment he comments upon the conflicting Authorities of *Bosvil v. Brander* (d), and *Pringle v. Hodgson* (e), as opposed to *Grey v. Kentish* and *Gayner v. Wilkinson*; and his reasoning, to which it is only necessary to refer without repeating it, satisfies me that the Law of this Court is that which he has laid down in conformity with the decision in *Gayner v. Wilkinson*. I confess myself quite unable to understand upon what grounds Lord *Rosslyn* rested, when he said, in *Pringle v. Hodgson*: "The question of Survivorship is quite laid aside by the Bankruptcy."

It has been urged that, inasmuch as, in the present case, the Bill was filed before the Husband died, the question is to be considered in the same manner as if a Decree had been obtained; and the case of *Steinmetz v. Halthin* (f) was cited: but that Case decided only that, where a Bill was filed to carry into execution the Trusts of a Will, under which a Husband and Wife, in her right, were entitled to a Legacy, and she died, pending the Suit, leaving Children, her equity to have a Settlement attached for the benefit of her Children. That decision, therefore, was a liberal decision, extending the Wife's right, and cannot be considered as deciding the converse, that the mere filing of a Bill against her and her Husband, when she survives him,

(d) 1 P. Wms. 458.

(e) 3 Ves. 619.

(f) 1 Glyn & Jam. 64.

shall be considered as an abridgment of her legal right.

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It has also been said that the Husband was entitled to the Interest on the Wife's Legacy; and that his Assignee is entitled to it, on the ground that a Court of Equity gives the Husband Interest on his Wife's Legacy, if he maintains her; and the case of *Macaulay v. Philips* (g) is cited. But, in the first place, nothing appears on the Pleadings in this Case as to the Bankrupt having maintained his Wife; and, in the next place, in the Case cited, there had been a Decree, and Proposals for a Settlement had been directed. Upon the whole, therefore, I am of opinion that the Plea must be allowed (h).

(g) 4 Ves. 15.

(h) See the preceding Case.

FLEMING v. ST. JOHN.

IN this Case, the Defendant demurred to the Bill because it sought a discovery of transactions which, if admitted, would have subjected him to a criminal prosecution under 9 Anne, c. 14, s. 5; and the question was, whether the objection ought not to have been made by Plea, and not by Demurrer.

Mr. *Pepys* and Mr. *Wilson*, in support of the Demurrer, cited *Mitf. Treat.* 157, 158; *Orme v. Crockford* (a); and said that a Public Act of Parliament was as much within the cognizance of all the Courts, as the Com-

4th and 7th
February.

Pleading.

Where a Bill charges a Defendant with acts which would subject him to a criminal Prosecution under a Statute, the Defendant need not plead the Statute, but may demur to the Bill.

(a) 1 Macleland's Rep. 185.

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mon Law was, and that a party was never bound to plead it.

Mr. *Sugden* and Mr. *Girdlestone*, jun. for the Bill, said that no objection could be made by Demurrer, unless it appeared on the face of the Bill; and they referred to *Nash v. Ash* (b).

The VICE-CHANCELLOR :—

The Demurrer in that Case appears to have been overruled, because it was too general.

7th February.

The VICE-CHANCELLOR :—

It struck me, at first, that it was proper to plead in this case: but, upon looking at Lord *Redesdale's* Treatise, and the Authorities he refers to, I find it to have been held that, in some Cases, where advantage has been taken of a Statute, it might be done by way of Demurrer, as in the *Earl of Suffolk v. Green* (c). I have made a Note of a Case which I argued in the Court of Exchequer, and which has been since reported (d). [His Honor here read the Note.] This Case is directly applicable; and I therefore think that the Demurrer ought to be allowed.

(b) 1 Eden, 378.

(c) 1 Atk. 450.

(d) 1 Atk. 450. *Whitmore v. Francis*, 8 Price, 616. The Note mentioned above was as follows :—" *Whitmore v. Francis*, Excheq. 14th December 1820. Bill filed to discover whether a Promissory Note was not given on an usurious Contract. It stated the Note to be given for Money lent, and that no Interest had been paid; and prayed Discovery merely by way of Defence to Action on the Note. Demurrer, that the Discovery would occasion a loss of the Money lent on the Note, allowed."

WETHERED v. WETHERED.

BY Articles of Agreement, bearing date the 28th of October 1805, and made between the Plaintiff, *George Thomas Wethered*, of the one part, and the Defendant, *Charles Wethered*, of the other part, after reciting that the Plaintiff and *Charles Wethered* were the two only Sons of *George Wethered*, who, it was presumed, stood seised and possessed of divers Freehold and Copyhold Estates, and also a considerable Personal Estate, part of which the Plaintiff, and *Charles Wethered*, expected to be given, devised or bequeathed to them by their said Father, and in case he should die intestate, then the Plaintiff and *Charles Wethered*, or one of them, by descent, by the Statute of distribution of Intestates Estates, or by surrender and the custom or customs of the Manor or Manors in which such of the Premises as were Copyhold were situate, or by some other ways or means would become entitled to such Freehold and Copyhold Estates, and a part of the Personal Estate of their Father, jointly with their Sister or otherwise : and further reciting that it had been agreed, between the Plaintiff and *Charles Wethered*, that such part of the Real and Personal Estates as they or either of them should derive, or become possessed of, or entitled unto under the Will of their Father, or which should come to them or either of them, by Descent or Deed, or in any other manner whatsoever, should be divided between the Plaintiff and *Charles Wethered*, in equal shares, first paying thereout all reasonable Costs, Charges and Expenses which they or either of them might be put unto, in or about the premises ; and fur-

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25th January
and
23d February.

Agreement.
Public Policy.

—
An Agreement between two Sons, to divide equally whatever Property they may receive from their Father in his life-time, or become entitled to under his Will, or by Descent or otherwise, from him, is not contrary to public policy, but will be enforced in Equity.

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ther reciting, that it had been also agreed between the same Parties that, in case *George Wethered* the Father, should, in his life-time, advance any sum or sums of Money, to them or either of them, to place them or either of them in business, or otherwise to advance them in life, such sum or sums of Money should go and be taken as part of their moiety or half part or share to arise and become paid and payable from their Father in manner aforesaid; it was witnessed, that the Plaintiff, for himself, his Heirs, Executors, Administrators and Assigns, did covenant and agree with *Charles Wethered*, his Heirs, Executors, Administrators and Assigns, that the Plaintiff, his Heirs, Executors, Administrators or Assigns, would, immediately upon the decease of his Father, or within six months next after, by Deed or otherwise, convey, assign or pay, unto *Charles Wethered*, his Heirs, Executors, Administrators or Assigns, one full moiety of all such Real and Personal Estate as the Plaintiff might become possessed of or entitled unto under the Will of his Father, or by Descent, or otherwise from him; and that *Charles Wethered*, for himself, his Heirs, Executors, Administrators and Assigns, would, in like manner, by Deed or otherwise, convey, assign or pay, unto the Plaintiff, his Heirs, Executors, Administrators or Assigns, one full moiety of all such Real or Personal Estate as he, *Charles Wethered*, might become possessed of or entitled to under the Will of his Father, or by Descent or otherwise from him, so that the Plaintiff or *Charles Wethered* should, neither of them, have, derive or receive in Monies, Real or Personal Estate, more than the other, but each take an equal moiety of all Property whatsoever which they or either of them might have or possess from their said Father, as fully and effectually,

to all intents and purposes, as if the same had been by him given, devised or bequeathed to them, share and share alike.

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By Indentures of Lease and Release, dated the 22d and 23d days of June 1807, being the Settlement on the Marriage of *Charles Wethered* with *Mary Ann* his Wife, then *Mary Ann Bell*, and made between *George Wethered*, the Father, of the first part, *Charles Wethered* of the second part, *William Bell* of the third part, and *Mary Ann Wethered* of the fourth part, *George Wethered*, the Father, conveyed unto *William Bell* and his Heirs, certain Houses in *Great Marlow*, to the use (after the solemnization of the Marriage) of the said *George Wethered* and his Assigns, for his life, with Remainder to the use of the Defendant *Charles Wethered* and *Mary Ann* his then intended Wife, their Heirs and Assigns for ever.

At the time of the execution of the Indenture of Release, *George Wethered*, the Father, by an Indenture, dated the 23d of June 1807, in consideration of the intended Marriage, leased the Premises comprised in the Indenture of Release, to the Defendant *Charles Wethered* and his intended Wife, their Executors, Administrators and Assigns, for the term of fifty years, if the said *George Wethered* should so long live, at the yearly rent of 5 l.

The Marriage took place accordingly: and *Charles Wethered* and his Wife took possession of the Premises comprized in the Lease, and held the same as Lessees, and received the Rents and Profits thereof until the death of *George Wethered*, the Father.

Besides the Premises leased to *Charles Wethered* and his Wife, *George Wethered*, the Father, previously to

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the Marriage, advanced to *Charles Wethered* 300*l.* and upwards, for the purpose of putting him into business.

George Wethered, the Father, by his Will, bearing date the 18th of March 1820, and duly executed and attested to pass Real Estate, gave unto his Brother the Defendant, *Thomas Wethered*, and *John Mossenton*, their Heirs, Executors, Administrators and Assigns, all his Freehold and Leasehold Messuages or Tenements, Lands, Hereditaments and Premises; and also all his Personal Estate and Effects, whatsoever and wheresoever, that he might die possessed of, interested in or entitled to, upon Trust to sell the same, and to pay and divide the Money arising from such Sale, equally between the Plaintiff and the Testator's Daughter, *Ann Wethered*, share and share alike: and the Testator appointed *Thomas Wethered* and *John Mossenton*, Trustees and Executors of his Will.

The Bill prayed that *Charles Wethered* might be compelled specifically to perform the Agreement between him and the Plaintiff: and that, for that purpose, an Account might be taken, of all Sums of Money which the Defendant had received from his Father, since the execution of the said Agreement, and the Rents and Profits of the Premises leased to him and *Mary Ann* his Wife; and that, upon the Plaintiff paying or conveying, to the Defendant *Charles Wethered*, one Moiety of what he might be entitled to by the Will of the Testator, the Defendant *Charles Wethered* might be decreed to pay to the Plaintiff one Moiety of what he should be found to have received from the Testator, and of the Rents and Profits of the Estate and Premises previous to the death of the Testator; and that the

Defendants, *Charles Wethered* and *Mary Ann* his Wife, might be decreed to convey to the Plaintiff, one moiety of the Estate and Premises conveyed to them by the Indentures of Lease and Release of the 22d and 23d of June 1807.

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The Defendants, *Charles* and *Mary Ann Wethered*, by their Answer, said that they did not believe that the Testator ever knew or was ever informed of the Agreement, or that, if he ever was informed or knew thereof, it was but a very short time before his decease; and that the Agreement was prepared and intended by the Plaintiff to defraud the Testator of his parental control over the Plaintiff, and of his right to dispose of his Property; and that *Mary Ann Wethered* continued ignorant of such Agreement being in existence till about twelve months after her Marriage, when she casually learned there was some Agreement in existence between *Charles Wethered* and the Plaintiff; but of the nature and effect of it she was wholly ignorant, till informed of it by the Bill; and that, to the best of their knowledge, information and belief, *William Bell* continued ignorant of the existence of any such Agreement during the whole of his life; and they submitted that *Mary Ann Wethered* and her Father *William Bell*, were Purchasers, under the Settlement, of the Estates and Hereditaments, as made by the three Indentures, for a good and valuable consideration, namely, the Marriage of the Defendants, and the Marriage Portion of *Mary Ann Wethered*, and which Marriage Portion they said was duly paid, by *William Bell*, to the Defendant *Charles Wethered*, and that the Plaintiff kept the Agreement concealed from *Mary Ann Wethered*, and, as they, the Defendants believed, from *William Bell*. And they submitted that, if the Agreement was otherwise binding, the same was,

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by reason of such concealment, a fraud on the right of *Mary Ann Wethered*, and upon the Marriage Settlement, and that the same ought not to be enforced against them. The Defendants admitted that they occupied the Hereditaments comprised in the Lease; and that the Testator, previously to their Marriage, advanced, to *Charles Wethered*, 300*l.*, for the purpose of assisting him to engage in and carry on the business of a Maltster; but that, except that Sum and the Estate and Premises limited and leased to them as aforesaid, the Testator did not at any time previous to their Marriage advance or pay to *Charles Wethered* any Sum of Money, by way of gift to him or for his advancement in life. And *Mary Ann Wethered* insisted that, in case it should appear that the Testator had advanced any Sums of Money to *Charles Wethered* for his advancement in life, inasmuch as the same, if any, were advanced prior to the Marriage, the same could not be affected by the Agreement.

Mr. Sugden, and Mr. Barber, for the Plaintiff:—

The question in this Case is concluded by authority, *Beckley v. Newland* (a). It is observable that, in that Case, the Agreement was made between persons who were not related to the Testator; but the Lord Chancellor, in his judgment, puts a case precisely similar to the one now before the Court. His Lordship says: "Suppose there were two Daughters, &c." (b). *Hobson v. Trevor* (c) is material for the purpose of showing the principle upon which the Court acts in cases of this nature. From these authorities it is quite clear that this agreement is, in all respects, binding. The only question then is, how far has the Plaintiff's right been

(a) 2 P. W. 182. (b) See *ibid.* 184. (c) 2 P. W. 191.

cut down by the transactions that took place after the Agreement. It cannot be represented, to the Court, that the Plaintiff has any Equity against the Wife, as she had no notice of the Agreement, and as she had the legal Estate. But, as respects the Husband, there is no difficulty; he can have no preference over the Plaintiff, and therefore, the Plaintiff is entitled to every thing that he can convey. The Plaintiff must submit to account for the Personal Estate, so as to let in the Defendant *Charles Wethered*; but, as he has disposed of part of the Estate, by procuring his Father to make the Settlement on his Wife, he must bring into account the entire value of the Fee-simple, before he can take a moiety of the Personal Estate. For, if a Father, having a power to appoint to his Son, makes an appointment to his Grandson, and the Son joins in it, it is considered as an appointment to the Son, first, and then an appointment, by the son, to the Grandson. There is no evidence that either *Charles Wethered*, or his Father, was imposed upon. He must account for every thing he received in his Father's life-time, the 300*l.* and the full Rent of the Premises comprised in the Lease.

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Mr. *Pepys* and Mr. *Wakefield*, for the Defendants,
Charles Wethered and his Wife :—

The Cases that have been referred to were over-ruled by Lord *Eldon*, C., in the Case of *Harwood v. Tooke* (*d*) It is discretionary in the Court to compel or refuse the specific performance of an Agreement. Here are two Sons, not knowing what disposition their Father may make of his Property, who enter into an underhand agreement, for the purpose of defeating his intentions,

(*d*) 1 Madd. Prin. and Prac. 549. See a Note of this Case, *post.* 192. Lord *Eldon* granted an injunction in the case cited, but dismissed the bill at the hearing.

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and who thereby protect themselves against the consequences of their misconduct, and bid defiance to parental authority. The Court must think that this Contract is pregnant with mischief, and will not assist the scheme of these two Sons. The only Case that applies to the present one, is *Beckley v. Newland*. In *Hobson v. Trevor*, the Party was dealing with his expectations; but that does not, of necessity, defeat the parental authority. The former Case is confined to what the Testator might leave to the two parties; but here the principle of the Case is sought to be extended to the 300*l.* which the Father, in his life-time, and more than twenty years ago, gave to his Son *Charles*. If the Court should be of opinion that *Beckley v. Newland* is still the Law of the Court, it will not extend it so as to interfere with what the Father might do in his life-time. The Contract is immediate; then why was *Charles Wethered* permitted to retain the whole of the 300*l.* He was advanced, and put into possession of the Property, the subject of the Lease, more than twenty years ago. Immediately on the Lease being executed, the Plaintiff became entitled to a moiety of that Property; then how came he not to assert his right to it at that time? If he then neglected to prefer his claim, the Court will not permit him to assert it now:—[*The Vice-Chancellor*:—Does it appear that the Plaintiff knew that his Brother had received the 300*l.*?]—From the nature of the transaction, it is clear that the advance must have been known to the Family.

The recital in the Agreement is more extensive than the operative part, which, there is some ground for contending, does not embrace advances made by the Father in his life-time. But, assuming that the parties did

intend that what the Father advanced in his life-time, should be divided, there is no authority for giving effect to that intention. Now it is not pretended that *Charles Wethered* took anything under the Will. The whole that he became entitled to (except the 300*l.*) was under the Settlement. *Litt. Sect. 291. Back v. Andrews (e), Green v. King (f), Doe v. Parratt (g).* Now it is admitted that what the Wife has, cannot be touched; and if these Cases be Law, she has the whole.

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v.
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Mr. *Roupell*, for the Defendant *Thomas Wethered*.

Mr. *Barber*, in reply:—

The Court may appoint a receiver during the continuance of the Husband's Interest, whatever that may be. This Case goes further than *Beckley v. Newland*; because the Agreement, in this Case, is more extensive than it was in that Case. The Plaintiff has not been guilty of any *laches* in asserting his right, as the Agreement could not be carried into effect until after the Father's death.

The VICE-CHANCELLOR, after stating the Case of *Harwood v. Tooke*, said that the doctrine laid down in *Beckley v. Newland* was so far from being overruled by the decision in *Harwood v. Tooke*, that he was bound to consider that it was upheld by that decision; that the notion that Agreements similar to the one in question, were contrary to the policy of the Law, was not supported by the principles of Law applicable to such Cases; because it was quite clear that, if a Testator

(e) Prec. Ch. 1. S. C. 2 Vern. 120.

(f) 1 W. Black. 1211.

(g) 5 T. R. 652.

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meant that his Devisee should have the Personal enjoyment of his bounty, he might so devise as to stint the enjoyment of the Devisee, and restrain him from aliening the subject of his Gift: but that, if the Testator did not so devise, it must be intended that he meant that his Devisee should not be so stinted, but should have the full enjoyment of the Property, and that it should be liable to all his antecedent Debts, and all his antecedent Contracts; and, therefore, that where there was a general Devise, it gave the Devisee the Property liable to be incumbered in any way that the Devisee might think proper, either before or after he took it.

A Specific Performance of the Agreement was decreed according to the Prayer of the Bill.

1809,
19th May;
and
1812,
4th February.

Agreement.
Public Policy.

An Agreement between two Persons, having expectations from a third, to divide equally whatever he might leave them, is valid.

WILLIAM TOOKE HARWOOD, Esq.

v.

JOHN HORNE TOOKE, and Sir FRANCIS
BURDETT, Bart.

THE Plaintiff was Nephew and Heir at Law, and also one of the next of Kin of *William Tooke*, Esq. a Gentleman of large Property. The Defendant *Tooke* was not at all related to, but was an intimate Friend of that Gentleman, and he and the Plaintiff having expectations from him, agreed, by Parol, to share equally between them what Mr. *W. Tooke* might leave them. In 1802 Mr. *W. Tooke* died, having left a much larger portion of his Property to the Plaintiff than to the Defendant *J. H. Tooke*. The Defendant, not wishing to press upon the Plaintiff to the extent of their engagement, pro-

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posed to accept 4,000 *l.* in satisfaction of his claims under the Agreement, and the Plaintiff gave him a Promissory Note for that sum. The Defendant afterwards indorsed the Note to Sir *Francis Burdett*, as the consideration for the purchase of an Annuity. The Bill prayed that the Note might be declared to have been unduly obtained from the Plaintiff, and without good or valuable consideration, and that it might be delivered up to be cancelled; and that, in the mean time, the Defendants might be restrained from using, applying, negotiating or paying away, or bringing an action against the Plaintiff respecting the Note.

1809.
—
HARWOOD
v.
TOOKE
and another.

An Injunction was granted, and the amount of the Note ordered to be paid into Court.

On the 19th May 1809, the Cause was heard, and the Money was ordered to be repaid to Sir *Francis Burdett*, and the Bill was dismissed, as against Sir *Francis Burdett* with Costs, and, as against *J. H. Tooke* without Costs.

Reg. Lib. A. 1808, fol. 667.

The Plaintiff having presented a Petition of rehearing, the Cause was reheard on the 11th May 1811, in the presence of Counsel for the Plaintiff, but no one appeared for the Defendants; and on the 4th of Feb. 1812, the Decree was affirmed.

Reg. Lib. A. 1811, fol. 475.

The Petition of rehearing was signed by Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Bell*.

1828. •
2d February.

Usury.
Vendor & Purchaser.
Public Policy.

A revolted Colony of *Spain*, not recognized as an independent State by *Great Britain*, executed Bonds, at six per cent. Interest, as Securities for a Loan. *P.*, acting in collusion with *B.*, a holder of the Bonds in *England*, by falsely representing that he had purchased some of them, induced the Plaintiff to become a purchaser: held, on demurrer, that the Bonds were not usurious, as it did not appear, by the Bill, that the Contract for the Loan was made, or the Amount of it to be paid in this Country; that *P.* and *B.* would have been answerable to the Plaintiff for Losses sustained upon his Purchase, but that, as the original Contract was made with a Government not acknowledged by *Great Britain*, the Court could not relieve him.

THOMPSON v. POWLES.

THE Bill stated that, in the month of August 1825, the Defendants *David Barclay*, *Charles Herring* the elder, *Christopher Richardson*, *Richard Jaffray*, *John Potter*, and *Charles Herring* the younger, carried on business, in Co-partnership together, as Merchants, in the City of *London*, under the Firm of "*Barclay, Herring, Richardson & Co.*;" that, in or shortly before the said month of August, the Defendants were in the Possession of Certificates of Obligation of the Government of the Federal Republic of *Central America*, or *Guatemala*, whereby the said Government agreed to pay certain Sums of Money, mentioned in the said Obligation, to the holders thereof; that in the same month *John Diston Powles* and *Alfred William Powles*, the two other Defendants, carried on business, in Co-partnership together, under the Firm of "*J. and A. Powles & Co.*:" that, in the said month of August, *Barclay, Herring, Richardson & Co.*, announced, by public Advertisement, that, on the 22d day of that month, they should proceed to sell Certificates of the Obligations of the Government of the said Republic of *Guatemala*, to the amount of 1,428,571 *l. 8s.*, and that they were ready to receive tenders for the same, pursuant to a Printed Form prepared by them and specified in such Advertisement: that, shortly after such Advertisement, the Firm of *J. and A. Powles & Co.*, in pursuance of a secret

arrangement between them and *Barclay & Co.*, sent to the latter Firm a Tender in the form prescribed by such Advertisement, and thereby offered to purchase the said Certificates of Obligation of the Government of the Federal Republic of *Central America*, to the amount of 1,428,571 *l.* 8*s.*, at the rate of 68 *l.* per Cent, and undertook to pay for the same in the following manner, namely, 15 *l.* per Cent. on the nominal amount of the Certificates, on the acceptance of their offer, and the remainder of the Purchase-money, by equal Instalments, on the following days; viz. on the 22d of September 1825. 7*l.* 11*s.* 5*d.* per Cent, on the 21st of October 7*l.* 11*s.* 5*d.* per Cent, on the 22d of November 1825, &c. &c. and the last Instalment on the 22d of March 1826. And, according to the terms of the said Tender, on payment of the last Instalment, the Certificates of Obligation were to be delivered to the Contractors, and discount for prompt payment was to be allowed at the rate of 3 *l.* per Cent per Annum, and the interest of the Certificates of Obligation was to commence from the 1st of August 1825; and, in case of failure of payment of any one of the Instalments, all the preceding payments were to become forfeited, and Messrs. *Barclay & Co.* were to be at liberty to resell the Certificates of Obligation: That the Tender on the part of *Powles & Co.*, was accepted by *Barclay & Co.* under such secret arrangement as is hereinafter mentioned; and it was afterwards publicly announced that *Powles & Co.* had contracted for the said Loan, and various Advertisements, and other public Notices were issued, in all of which the two Firms were represented as distinct Parties to the transaction, Messrs. *Barclay & Co.* being represented as the Agents for the sale of the Certificates, and Messrs. *Powles & Co.* as the Contractors for the purchase

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thereof: that *Powles & Co.*, being intimate friends of the Plaintiff, informed him that they had just entered into a Contract to take the *Guatemala* Loan, and that they fully expected it would bear a Premium, and, therefore they strongly advised the Plaintiff to purchase of them a portion of such Loan ; and, upon such representations, the Plaintiff was induced to agree to purchase of them, and accordingly did agree to purchase of them such Certificates or Special Obligations, for 10,000 *l.* at the price of 73 *l.* per Cent. That the Plaintiff accordingly, on the 27th of August 1825, paid to *Powles & Co.* the first Instalment of 10 *l.* per Cent on the amount of the Certificates agreed to be purchased by him, such Instalment amounting to 1,000 *l.* ; and thereupon, they delivered to him Twenty Scrip Receipts or Vouchers for such payment, such Scrip Receipts being for the Instalment on Special Obligations or Certificates for 500 *l.* which were in the following Form: “ Six per Cent Loan for the Federal Republic of “ *Central America*, 500 *l.* N° 819. Received the sum of “ 50 *l.*, being the first instalment of 10 *l.* per cent on “ 500 *l.* Special Obligations, purchased by us from “ the Agents of the Federal Republic of *Central Ame-* “ *rica* ; and we hereby agree to deliver, to the Bearer, “ Special Obligations of the said Federal Republic of “ *Central America*, to that amount, in the form in “ which they have been contracted to be delivered “ to us, bearing Interest from the 1st inst., on return “ of the Receipt, and on payment of the following “ Sums, on or before the Dates hereinafter specified, “ viz. on 13th October, 10 *l.* per cent on 500 *l.* being “ 50 *l.* ; 10th Nov. 5 *l.*, 25 *l.* ; 12th January, 10 *l.*, 50 *l.* ; “ 9th Feb. 5 *l.* with Interest at the rate of 5 *l.* per cent “ from the 1st of January, 25 *l.* 0 s. 6 d. ; 9th March,

“ 5*l.*, 25*l.* 2*s.* 6*d.*; 13th April, 10*l.*, 50*l.* 9*s.* 9*d.*;
 “ 11th May, 5*l.*, 25*l.* 6*s.* 9*d.*; 13th July, 5*l.*,
 “ 25*l.* 11*s.* 1*d.*; 10th August, 8*l.*, 41*l.* 0*s.* 10*d.*,
 “ 317*l.* 11*s.* 5*d.* In default of payment of any of the
 “ above Sums, the Payments before made are to be
 “ forfeited, and the engagement on our part is to be
 “ void. *London*, 27th August, 1825. *J. and A. Powles*
 “ & Co. Entered, *A. H.*” And such Scrip Receipts
 contained printed forms of Receipts for each Instal-
 ment, to be signed, by *Powles & Co.*, when, and as
 such Instalments should respectively be paid: That
 the Plaintiff regularly paid to *Powles & Co.* the second,
 third, fourth and fifth Instalments upon the Purchase-
 money for the Certificates, making the Sum paid by
 him on account thereof, 4,000 *l.*; and Receipts for such
 Instalments were accordingly signed by *Powles & Co.*
 upon the Scrip Receipts before-mentioned: that all the
 Payments which had been made by the Plaintiff were
 paid by him, by the desire of *Powles & Co.*, into the
 house or firm of *Barclay & Co.*: that, at the time when
 the sixth Instalment became due, the Plaintiff offered
 to pay the same, but was prevented from so doing by
Powles & Co. who, with the view, as the Plaintiff after-
 wards discovered, of making him commit a forfeiture
 of the Instalments already paid, advised him not to
 make any more payments, saying that there was a dis-
 agreement between *Barclay & Co.* and the Government
 of *Guatemala*, respecting the Loan, and that it would
 not be expedient, or, perhaps, safe to make any further
 payment, to *Barclay & Co.*, in respect of the Certificates
 of obligation, until such difference should be settled;
 and, under these circumstances, the Plaintiff, although
 at that time perfectly ready to make such payment, re-
 frained from so doing: that the Plaintiff had then

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recently discovered that the representations made by *Barclay & Co.* and *Powles & Co.* with respect to the nature of the Contract between them, were untrue, and that, instead of *Barclay & Co.* having sold the Certificates by tender to the highest bidder, as they professed to do, it had been, and was privately arranged between *Barclay & Co.* and *Powles & Co.*, that the latter should become the nominal Contractors for, and Purchasers of the Certificates, at the price of 68 *l.* per cent, but that *Barclay & Co.* should be, clandestinely, Partners with them in the transaction, and should have some larger interest therein than the Messrs. *Powles*, and should, in fact, themselves be the Purchasers of the Certificates, to the extent of 100,000 *l.*, but that such Agreement or Arrangement and Interest, should be concealed, both from the Parties for whom *Barclay & Co.* were Agents for the sale of the Certificates, and from the Public, or Persons who were to be invited by *Powles & Co.* to purchase such Certificates: that such Arrangement was a fraud both upon the *Guatemala* Government, for whom *Barclay & Co.* were Agents in the transaction, and upon the Persons who purchased such Certificates in ignorance thereof, and, amongst others, upon the Plaintiff, but that such Arrangement was acted upon, and the whole of the Certificates were sold and disposed of by *Barclay & Co.* and *Powles & Co.*, in the names of the latter Persons, and such Certificates were sold, to the amount of 400,000 *l.* at 72 *l.* per Cent, and the remainder, at 73 *l.* per Cent, and many of the Instalments upon such Sums were paid, by the Purchasers of such Certificates, to *Powles & Co.* and *Barclay & Co.*; and, by such means, the latter firm received Monies to the amount of several hundred thousand pounds; that *Barclay & Co.* and *Powles & Co.*

did not remit the Monies which they so received, or any Monies, to the *Guatemala* Government, or the Persons for whom they were Agents in these transactions, and that, in fact, they divided such Monies amongst themselves; and the *Guatemala* Government, having discovered the fraud which was so practised upon them by *Barclay & Co.* and *Powles & Co.*, refused to adopt or be bound by the said Arrangement, or to pay any of the Special Obligations or Certificates so placed in the hands of *Barclay & Co.* as aforesaid: that, under the circumstances aforesaid, the Plaintiff, and the other Purchasers of the Certificates, having declined to pay any further Instalments on account of their Purchase-monies, *Barclay & Co.* and *Powles & Co.* had declared all the Deposits and Instalments already paid to be forfeited, and had converted all such Monies to their own use: that, under the circumstances aforesaid, the Plaintiff was advised that he was entitled to call upon *Barclay & Co.* and *Powles & Co.* to pay to him the Monies he had so advanced and paid for the purchase of the Certificates, together with Interest thereon, at the rate of 5 *l.* per Cent, from the date of each advance.

The Bill charged that, in fact, at the time when the sixth Instalment became due, the Plaintiff was ready and willing to pay the same, but was prevented from so doing by the advice of *Powles & Co.*, which advice was given by them in collusion with *Barclay & Co.*; and that, in fact, a fraud was practised upon him by the Defendants, in respect of the purchase of the Certificates, by representing the Contract, for the purchase of the Certificates by *Powles & Co.*, as a *bonâ fide* transaction, and by concealing, from the Plaintiff, the fact that

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Barclay & Co. were, in fact, at once the buyers and sellers of the Shares: that whilst *Barclay & Co.* were publicly acting as the Agents for the sale of the Certificates, and professing to offer the same to a fair competition, and to make, with *Powles & Co.* a Contract of Sale to them, it had been planned and arranged between these Parties, that, although *Powles & Co.* should ostensibly appear as the Contractors for the Loan, yet that they and *Barclay & Co.* should be Partners in the Loan; or, if not, that there was some agreement, arrangement or understanding between *Powles & Co.* and *Barclay & Co.* that the last mentioned firm should be concerned in and have a joint Interest, or some other Interest, with *Powles & Co.* in the purchase of the Certificates, or should be, in some manner, or to some extent, interested in the profit or loss on the transaction: that, if *Barclay & Co.* ever acted as such Agents, they had never made any remittances to the *Guatemala* Government, on account of the Sale of the Certificates, or that the Sums remitted by them to the Government, or paid on account thereof, had not been nearly to the amount of the Monies received by them on account of the matters aforesaid; that the Government, in consequence of the fraud practised upon them by the Defendants, had rescinded the said transaction, and had refused to abide by the sale of the Obligations so made as aforesaid, and had publicly announced that they would not pay such Obligations; and that, in fact, such Obligations had been returned, by the Defendants, to the Government; and that the Contract with the Government was at an end, and could not be performed, and that the Defendants could not deliver to the Plaintiffs the Certificates which he contracted to purchase, if, under the circumstances, the Plaintiff was bound to accept the same.

The Bill prayed that the Defendants respectively, might be declared to be liable to the Plaintiff under the circumstances before mentioned, for the amount of the several Sums thereinbefore mentioned to have been paid by him for Instalments upon his Purchase-money for the Certificates or Special Obligations; and that they might be decreed to pay the same to him, with Interest at 5*l.* per Cent per Annum, from the date of each payment.

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The Defendants, the Messrs. *Powles*, demurred generally to the Bill.

Mr. *Pepys*, and Mr. *Jacob*, in support of the Demurrer:

The Bill, in this Case, is filed by a person who describes himself as a subscriber to the *Guatemala* Loan, to recover the amount of the Monies paid by him. He says that he has paid five of the Instalments, but has declined to pay the remaining ones, because the *Guatemala* Government has discovered the transaction which he states to have taken place between *Powles & Co.*, and *Barclay & Co.*, and have refused to pay the Bonds, or to let them be delivered out. If that statement had stood alone, if the *Guatemala* Government had improperly refused to acknowledge their Bonds, it would not have given the Plaintiff any claim against the Defendants, who are merely the instruments of that Government. But the Plaintiff says that the Defendants, by their conduct, gave the *Guatemala* Government a right to repudiate their Contract. This depends upon the question, whether the Agents of the Government did so conduct themselves as to authorize the Government to repudiate their Contract. The Bill

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begins with alleging that *Barclay & Co.* were in possession of these Certificates, but does not say in what character they held them. It then states that *Barclay & Co.* were Agents for the sale of the Certificates, and that the arrangement between them and the other Defendants was to be concealed from the parties for whom they were Agents, without saying for whom they were Agents. The Bill next alleges that neither *Barclay & Co.* nor *Powles & Co.* remitted the Monies they had received, to the *Guatemala* Government, or, the persons for whom they were Agents. So that the fact of their being Agents of the Government is spoken of doubtfully. Again, in the charging part of the Bill, it is averred that the Defendants allege that *Barclay & Co.*, in the sale of the Certificates, acted as the Agents of the *Guatemala* Government; and then the contrary is charged; and that, if *Barclay & Co.* did ever act as such Agents, they never made any remittances to that Government. It appears, therefore, from the whole of the Bill, to be doubtful whether *Barclay & Co.* were or were not the Agents of the Government; and yet it is upon this agency that the whole case must turn; for, if *Barclay & Co.* were not such Agents, *non constat* that the Government had any right to repudiate their Contract.

The whole of this transaction arises out of a Loan to a Government which is not recognized by this Country, and which is still part of the Dominions of the King of *Spain*. It appears, from a variety of cases, that such a transaction is illegal. *Jones v. Kinder* (a);

(a) When this Case was argued there was no printed Report of the decision above referred to: it is now reported under the name of *Jones v. Garcia del Rio*, 1 Turn. & Russ. 297.

in which *Lord Eldon, C.*, though he did not formally decide the point, strongly intimated an opinion that such a transaction could not be recognized in the Courts of this Country. *De Wütz v. Hendricks* (b). *Yrisarri v. Clement* (c). The Courts of this Country take notice of those public Acts which are recited in Treaties. Now, in a treaty between *Spain* and *Great Britain*, the Inhabitants of this Colony are described as revolted Subjects. In *Biré v. Thompson* (d), a motion for an Injunction was made before *Lord Eldon, C.*, and was refused, because the *Lord Chancellor* could not take notice of the Republic of *Colombia*. But it is not merely that the Courts do not recognize these States, but contracts for supplying them with Money are actually illegal. It must be looked at as a question of international Law. In the *American* war, *Great Britain* declared war against *France* and other Countries, on the ground of interference between her and her Colonies. In *Hennings v. Rothschild* (e), *Best, C. J.* says: "Whoever looks into the Law may find it very doubtful, whether any person holding allegiance to the King of this Country, can, without the King's consent, borrow Money or lend Money to a Foreign Prince."

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There is another objection, which appears on the face of the Bill. These Bonds were to bear Interest at Six per Cent, and were purchased by the Plaintiff at Seventy-two per Cent, so that he was to receive 6*l.* for Interest upon 72 *l.*; there can then be no doubt that

(b) 2 Bing. 314.

(c) 2 Carr. & Payne, N. P. C. 223.; and 3 Bing. 432.

(d) Not reported. See the Judgment in the next Case.

(e) 4 Bing. 315. 335; 9 Barn. & Cress. 470; and see *Yrisarri v. Clement, ubi sup.*

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the Contract was of a usurious nature. *Barclay & Co.* were the agents of the *Guatemala* Government, or else the whole Case falls to the ground. The Contract for raising the Money was made in *England*, and the whole transaction was an *English* one. It is impossible to represent it as a sale of Bonds, for the business was transacted by the Agents themselves ; and it therefore falls within our Usury Laws.

But, independently of this, the nature of the relief prayed by the Bill, is to be considered. The Plaintiff alleges that he has been defrauded, and comes to this Court for the same relief as a Court of Law would afford him. The proper remedy is by an Action for Money had and received. Lord *Redesdale* treats, indeed, of Cases where Equity will relieve against Fraud (*f*) ; but those are only where the Defendant has an advantage in a proceeding at Law, which it is against conscience that he should use. Thus, if a Defendant has got a Deed which he can plead at Law, a Bill may be filed : but not where the Plaintiff's demand is a mere Money demand. If this Bill is sustained, then a Bill would lie to try a Horse-cause in this Court. There are two Cases which may be said to be authorities for granting the relief sought by the Bill, namely, *Colt v. Woollaston* (*g*), and *Green v. Barrett* (*h*). These Cases do not lay it down, as a general principle, that, in all cases of Fraud, a Bill in Equity would lie, instead of an Action for Money had and received. In those Cases, it is represented that the whole transaction was, *ab origine*, fraudulent. It is not said, here, that the Defendants had no intention of sending the Money to

(*f*) See Treat. Plead. 103.

(*g*) 2 P. W. 154.

(*h*) *Ante*, 1st Vol. 45.

Guatemala; but that, subsequently to the Plaintiff paying his Money, there has been a disaffirmance of the Contract, by the *Guatemala* Government, which has given the Plaintiff a right of Suit.

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Mr. *Bickersteth* and Mr. *Pemberton*, in support of the Bill :—

The allegations of this Bill (which, as a Demurrer has been put in, must be taken to be true) amount to a gross Fraud.

The first objection made to the Bill, is that it is not distinctly charged that *Barclay and Co.* were the Agents of the *Guatemala* Government. The Case made, is not that the *Guatemala* Government entered into a Contract with us through their Agents, but that, whether the Defendants were Agents or not, they have so conducted themselves, that their Contract cannot be enforced. If the Defendants have been guilty of a Fraud, it is immaterial whether they were or were not the Agents of this Government. All that is material is that they induced the Plaintiff to put Money into their hands, under a representation that was false. If they were not the Agents, they committed another Fraud. The Plaintiff says that *Powles and Co.* represented to him that they had purchased these Certificates at 68 *l.* per Cent, whereas there had, in fact, been no such purchase. This representation necessarily influenced the Plaintiff as to the price which he was to pay; and he was induced, by that representation, to believe that 72 *l.* per Cent was a fair price for him to give. A Contract founded on such misrepresentation, is one which a Court of Equity would set aside. The Plaintiff next says that *Powles and Co.* advised him to withhold pay.

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ment of the Sixth Instalment, to induce him to commit a forfeiture of the Monies he had already paid. This alone would be sufficient to support the Bill, and to justify the Court in saying that the Defendants should not avail themselves of a forfeiture caused by their own Fraud. The Equity of the Case is not that the Fraud was practised upon the *Guatemala* Government, but upon the Plaintiff. If the Defendants have, as is alleged, put it out of their own power to perform their Contract, it becomes immaterial whether they were the Agents of the Government or not, or whether there has or has not been a Fraud committed, as between themselves and their Employers.

The next objection is that the proper remedy, in this Case, is an Action for Money had and received. But that point is settled by *Colt v. Woollaston*, and *Green v. Barrett*. In the former of those Cases, The M. R. says : " It is no objection that the Parties have their remedy at Law, and may bring an Action for Monies had and received for the Plaintiff's own use ; for, in cases of Fraud, the Court of Equity has a concurrent jurisdiction with the Common Law, matter of Fraud being the great subject of relief here." This Case is precisely in point, and has never been called in question ; and there were, there, no Bonds or other Instruments to be delivered up. It is clear that, in *Green v. Barrett*, an action for Money had and received, might have been brought, and the express objection was taken : but Sir *John Leach*, V. C. decided upon the authority of *Colt v. Woollaston* : the second objection therefore is entirely disposed of. Besides, the Action for Money had and received is an equitable Action, and Courts of Law have assumed a jurisdiction that originally belonged to

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Courts of Equity. But here there has been collusion between *Barclay and Co.* and *Powles and Co.*, and the plaintiff might, perhaps, recover at Law against *Powles and Co.*, who have got his Money, but could not recover against *Barclay and Co.*: now Courts of Equity say that all Parties to a Fraud shall be answerable for it.

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The next objection that is made in this Case, is that the transaction between *Barclay and Co.* and the *Guatemala* Government, is one which the Courts of this Country will not recognize. For the purposes of this Case, it is immaterial whether there was or was not any such Government as that of *Guatemala*. Here the transactions with that Government are perfectly collateral to the Case. This is not a Bill to enforce a Contract between The *Guatemala* Government and the Plaintiff: in point of fact there has never been any such Contract. It is immaterial to the Plaintiff's Case whether there was any such State in existence or not. All that he says, is that the Defendants represented to him that there was such a Government, and, by false pretences, got possession of his Property. He does not ask of the Court to recognize that Government. The recognition of it is not necessary for the purpose of a Decree being made for the Plaintiff. The only thing that he shows, is that the alleged existence of this Government was the Instrument which the Defendants used to commit this Fraud. Upon what ground, however, is the Court to presume that this is a revolted Province now in arms against *Spain*, or that it ever was part of the *Spanish* Colonies; or, if it was, that it has not been recognized, by *Great Britain*, as an independent State? But, sup-

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posing the Contract between *Barclay and Co.* and The *Guatemala* Government was illegal, that does not affect a derivative Contract between two Individuals in this Country. Can *Powles and Co.* be allowed to say that, because, as between themselves and The *Guatemala* Government, the Contract was illegal, the Plaintiff shall not recover back the Money that he has paid. He does not attempt to enforce that Contract, and to have the Securities delivered to him, but to be repaid his Money. But, supposing the Contract between *Powles and Co.* and the Plaintiff to be illegal, no considerations of public policy ought to prevent his rescinding it and recovering his Money. *Yrisarri v. Clement*, was a Case of Libel; and there the Loan was made to a Nation at war.

The last objection is that this transaction is usurious. If this Contract is usurious, then every Contract for the Purchase or Sale of Foreign Stock is usurious. It is nothing more than the Purchase of a Security, and is binding in that Country only in which it is to take effect. The Purchaser cannot avail himself of it to obtain Payment, except in a Foreign Country; and it does not admit of being questioned, that Bonds made by a Foreign Power may be sold here for any price that Persons may be willing to give for them.

Mr. *Pepys*, in reply :—

There is no allegation in the Bill that the Defendants were acting as the Agents of The *Guatemala* Government; but every instance of fraud imputed to them, depends upon their holding that character. The Plaintiff says that the loss he sustained was caused by the

Government refusing to ratify their Contract. If *Powles and Co.* were not the Agents of the Government, they are not responsible for the loss, as they were no Parties to that which led to the disavowal of the Contract; they were not participators in any fraud upon the Plaintiff; but prevented him from continuing to pay the Instalments, which he would otherwise have lost. The Plaintiff having purchased these Certificates, has become a Creditor of the Country, and has made a direct advance of Money to a Government which *Great Britain* has not recognized, and which is in a state of hostility with *Spain*, the mother Country, which is an Ally of *Great Britain*. How then can the Plaintiff say that he has not entered into an illegal Contract? The Cases uniformly decide that if Parties enter into an illegal Contract, the Courts will assist neither Party, but will leave the matter where they found it. It is nowhere stated that the Plaintiff was influenced by the price that *Powles and Co.* represented that they had agreed to give for the Securities.

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The next point is equally clear, I mean, that this transaction is within 12 Ann, st. 2, c. 16, as being a Contract for a Loan at Six per Cent, made in this Country. What was the state of the Law in the interval between the passing of that Statute and the 14 G. 3, c. 79, appears from *Stapleton v. Conway* (i). The 5th Sect. of the latter Act contains a legislative recognition that Securities bearing a higher interest than Five per Cent, are within the 12th Ann, except where they are excepted by 14 G. 3; *Phipps v. Earl of Anglesea* (k), *Dewar v. Span* (l). It is said that, if this Contract is

(i) 3 Atk. 727. S. C. 1 Vez. 427. (k) 1 P. W. 696.

(l) 3 T. R. 425.

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held to be usurious, it will render void all Contracts for Foreign Loans, at a higher rate of Interest than Five per Cent. To prevent this, Parties who have entered into treaties for such Loans, have gone into Foreign Countries to complete their Contracts. The Defendants were in possession of the Certificates which they proposed to sell. The transaction therefore was not a mere bubble, as in *Colt v. Woollaston*, and *Green v. Barrett*.

Mr. *Bickersteth* observed upon the Cases that had been cited in the reply, and said that not one of them approached to a Case like the present; that this was not a Contract entered into between Parties residing in this Country; but that payment was to be made, and all the other acts of the Obligation were to be done abroad: that, in *Stapleton v. Conway*, there was no Contract as to the rate of Interest: that, in *Dewar v. Span*, both the Obligor and Obligee were residing in *England*: that, if the Bonds had been the Bonds of *Powles* and *Barclay*, they would have been usurious; but that they were the Agents of the Obligor abroad, who had entered into the Obligation abroad.

The VICE-CHANCELLOR:—

It appears to me that there is considerable difficulty, on the face of the Bill, in understanding what was the nature of the things to be purchased; for, though it might be collected, from some parts of the Bill, that the Certificates and Obligations mean the same thing; yet some of the passages, certainly, put them in direct opposition to each other. When I read the Bill, it seemed to me that the Certificates were mentioned as distinct from the Obligations: but I should be very sorry to determine the Case on any point so extremely minute.

With respect to the question of Usury, in order to hold the Contract to be usurious, it must appear that the Contract was made here, and that the Consideration for it was to be paid here. It should appear, at least, that the payment was not to be made abroad; for, if it was to be made abroad, it would not be usurious. All that is stated about the nature of the Bonds, is what you collect from that Receipt, which is headed: "Six per Cent Loan." But there is nothing to show that the payment was to be made here; and I cannot intend that it was to be made here, because that would be making an intendment merely to bring the Case within the operation of a penal Statute; and, therefore, I think that I cannot decide the question on the ground of Usury.

Next with respect to the matter of Fraud. This it is said consisted in the representation, stated to have been made, by Messrs. *Powles*, to the Plaintiff, that they had just entered into a Contract to take The *Guatemala* Loan, and that they fully expected it would bear a Premium, and, therefore, strongly advised the Plaintiff to purchase of them a portion of that Loan. The circumstance that *Powles and Co.* had become the Contractors for the Loan, might, of itself, have been an inducement to other persons to purchase the Bonds; and I must infer, from the frame of the Bill, that this representation did so operate on the mind of the Plaintiff, as to induce him to become a purchaser of these Bonds, though he would not have become a purchaser, provided the fact had been that Messrs. *Powles* had not been the Contractors for the Loan.

The other matter of Fraud which the Plaintiff's Counsel rely upon, is that Messrs. *Barclay and Co.* so

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dealt with these Bonds as to absolve the Government from their obligation to deliver the Certificates. This is not, in my mind, a Fraud; for I do not collect, from this Bill, that the mode in which Messrs. *Powles* and *Barclay* dealt, taking it even as it is stated, would absolve the Government from their obligation to deliver the Certificates. All that would result, from the course of dealing which was pursued between Messrs. *Barclay* and *Powles*, would be this, that the Government would have a right to call on Messrs. *Barclay* to pay the whole amount which they received, namely, 73 *l.* per Cent. For Messrs. *Barclay and Co.* were the Agents of the Government to sell these Obligations, and, therefore, they could not, fairly, give their Government credit for 68 *l.* per Cent only, when, in point of fact, the sale between themselves and *Powles and Co.* at 68 *l.* per Cent., was merely fictitious, and *Powles and Co.*, by virtue of that fictitious sale, received 73 *l.* per Cent from the real purchaser. I think, therefore, that the Government are not absolved from the performance of their Contract; but that they would only have a right to recover the 73 *l.* per Cent. I do not, therefore, consider that as a case of Fraud. But it appears to me, on the first ground, if it had stood alone, that it would have been a Fraud; and I think that the Court would have relieved the Plaintiff.

But there is this further consideration: that this is represented to have been a Contract, by the Plaintiff, to purchase the Obligations of persons who were stated to be the Government of the Federal Republic of *Central America*. I confess that, after all I have heard fall, from the mouth of Lord *Eldon*, on the subject of persons representing themselves to be Governments of Foreign Countries,

which this Country had not acknowledged to be Governments, and which the Courts cannot acknowledge them to be, till the Government of the Country has recognized them to be so, it does appear to me that this is a Contract entered into by the Plaintiff for the purpose of purchasing that which, by the Law of the Land, he could not purchase. I think that the Contract, being to purchase Securities from these persons, who, as the Plaintiff says, were The Government of *Guatemala*, cannot be considered as being a Contract which this Court ought to sanction. The whole Case being founded on that, I do not think that I could give relief to the Party, who builds his Case for relief entirely on a transaction originating in such a manner; and it appears to me that, on that ground, I must allow this Demurrer(m).

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(m) See the next Case.

TAYLOR v. BARCLAY (a).

THE Bill in this Case prayed a discovery only. It alleged that, in August 1825, *Barclay and Co.* representing themselves to be the Agents of the Government of the Federal Republic of *Central America*, which was a *Sovereign and Independent State*, recognized and treated as such by His Majesty the King of these Realms, and in a state of amity with this Country, publicly announced their intention of raising a Loan, for the said Republic, by

(a) This Suit was instituted against the same Defendants as *Thompson v. Powles*, and nearly resembled that Case in its circumstances; for which reason it was thought advisable to report it here.

that the allegation is false, and not to give it the

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To prevent a Demurrer to a Bill, it was falsely alleged in it that a revolted Colony of *Spain* had been recognized by *Great Britain* as an independent State: the Court is bound to know, judicially, intended effect.

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open competition, to be paid by Instalments : that *Barclay and Co.* proposed to raise such Loan upon the security of Bonds or Special Obligations of the said Government ; and represented that the Bonds, or Special Obligations were not to be delivered, in the first instance, to the Subscribers to the Loan ; but that Certificates of Obligations, purporting to be issued by the said Government, should be given to them on payment of the first Instalment, and that, on payment of the last Instalment, and on production of the Certificates to the then Contractor for or Buyer of the Loan, Special Obligations of the Government would be delivered to the holders of the Certificates : that it was afterwards publicly advertised that *Powles and Co.* were the highest bidders, and had contracted for the Loan ; that, in all the Advertisements, the two Firms were represented as distinct Parties to the transaction, and as having no common or joint-interest therein : that the Plaintiff was induced, by Messrs. *Powles*, to purchase of them seventeen of the Certificates, and afterwards duly paid, by the direction of *Powles and Co.*, five of the Instalments of the Purchase-money, into a Banking-house, to the credit and on the account of *Barclay and Co.* ; whereupon *Powles and Co.* signed Receipts upon the Certificates : that the Plaintiff, by the advice of *Powles and Co.* forebore to pay the sixth Instalment : that such advice was given, as the Plaintiff afterwards discovered, with the view of making the Plaintiff commit a forfeiture of the former Instalments ; that *Barclay and Co.* were not authorized by the Government (as the Plaintiff had also since discovered) to make the said Contract, or to bind the said Government thereby ; and that the same was well known to *Powles and Co.* : that the Plaintiff had also recently discovered that, instead of *Barclay and Co.* having publicly sold the

Certificates to the highest bidder, it had been clandestinely arranged, between them and *Powles and Co.*, that the latter should be the nominal Contractors for the Loan, and Purchasers of the Certificates; and that *Barclay and Co.* should be secretly Partners with them in the transaction: that the representations, made by *Barclay and Co.*, that they were authorized to make the Contract, and that they had sold the Certificates, by Public Sale, to *Powles and Co.*, were made in order to induce persons to purchase the Certificates at higher prices than they would have given if they had known the real nature of the transaction; and that such conduct was a fraud upon the Plaintiff and the other Persons who had purchased the Certificates in ignorance thereof: that the Plaintiff was about to commence an Action against the Defendants, to recover the amount of the Instalments which he had paid. The Bill prayed a Discovery in aid of that Action.

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The Defendants put in general Demurrers.

Mr. Sugden, Mr. Pepys, Mr. Simpkinton, Mr. Purvis,
and Mr. Jacob, in support of the Demurrers:—

First, This State has never been acknowledged by *Great Britain*. There is an existing Treaty which recognizes *Guatemala* as still belonging to *Spain*. In order to avoid a Demurrer, an allegation has been introduced, into the Bill, that *Guatemala* is a Sovereign and Independent State, and has been recognized as such by his Majesty; and the simple question is, whether that allegation can have the intended effect. Now the Judge is bound to know that our Government has never recognized this State: and, if an allegation, which

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is false on the face of it, is made in a Bill, it goes for nothing.

Second: The buying of these Securities was an illegal act; and, therefore, the Court will not aid the Plaintiff to recover his Money.

Third: The fraudulent conduct imputed to the Defendants, amounts either to a conspiracy, or to obtaining Money under false pretences, which are indictable offences; the Defendant cannot therefore be compelled to answer the Bill (*b*).

Mr. Bickersteth, Mr. Pemberton, and Mr. Hill, in support of the Bill:—

It has been assumed that the Court is bound to know that the allegation in question is not true; but it has not been even hinted what is meant by the recognition of a State. There might be such a recognition as a Judge would not be held to have judicial knowledge of. A Congress was held at *Panama*, and Officers from our King met, there, Functionaries from *Guatemala*. Is it unlawful to enter into Contracts with a State, because it has not been formally recognized by Treaty, or by the sending of an Ambassador or other public Functionary. If so, no Contracts can be made with the Governments of the *South Sea Islands* and of many other Countries. Doctrines so subversive of fair dealing, were never before propounded. In October 1823, two years before this transaction took place, *Spanish America* was recognized, by our Government, as separated from *Spain*;

(*b*) The Arguments upon this third Objection are not reported at length, because the Court decided the Case upon the first.

for Consuls were sent to those parts of that Country where the protection of *British* Commerce required them. The ground of Lord *Eldon's* doubt in *Jones v. Garcia del Rio* (c), was not that the transaction was with an unrecognized State, but that this Country was at peace with *Spain*. Will any one say that, after Commerce between *Great Britain* and these Provinces has been permitted from year to year, and after Consuls have been sent to them, there is still the difficulty existing that struck the mind of Lord *Eldon*? It is important to look at the mode in which the recognition took place. It was not a recognition of certain particular States; but a distinct, unqualified recognition of the independence of the whole of *Spanish America*; and the only distinction that was made in the sending of Ministers, arose from the greater importance of the places to which they were sent. *Guatemala* was part of *Mexico*; and the independence of *Mexico* was recognized the first of all the Provinces. In the King's Speech delivered in 1824, we find a distinct recognition of the same independence. It is not necessary that there should be a Treaty subsisting, and a resident Minister, to give validity to Contracts between two States (d). Supposing that a Contract between an unrecognized State and an individual of this Country, would not be valid, does it necessarily follow that, if the Goods, the subject of the Contract, were actually purchased and brought into this Country, they could not be made the subject of barter or contract here?

It is clear that, if the facts stated in the Bill are proved, an Action for Money had and received might

(c) 1 Turn. & Russ. 297.

(d) Vattel, Law of Nations, Book II. chaps. 2 & 4.

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be maintained. If, therefore, there is a clear ground of action, why is it not a Case for discovery? Will it be said that there is no ground of action because the Contract was illegal? But Money paid upon an illegal Contract may be recovered, if the Contract is not completed (e); and, therefore, it is not necessary to show that the Contract between *Barclay & Co.* and The *Guatemala* Government was legal. If, indeed, *Barclay & Co.* had received the whole of the Instalments, and had delivered the Obligations to the Plaintiff, and those Obligations could not be enforced because they were illegal, the Plaintiff must have acquiesced in his loss.

If a Partnership defraud a Person, can it be said that, as the Partners have conspired to commit a Fraud, an Indictment against them would lie, and therefore they cannot be compelled to give a discovery. If that be so, then, in all Cases where two Persons join in cheating a third, he can obtain no discovery from them, and the only Case in which this Court will give its assistance, is where the Fraud has been committed by a single Person. There is scarcely ever a Bill filed to unravel a Fraud, that does not state a Case of Conspiracy. But this Bill does state a Case which, if proved, would subject the Defendants to a prosecution for a Conspiracy. But if it did state such a Case, the Defendant is not, on that account, protected from answering (f). If the Bill had imputed a Felony to the Defendants, they could not have put in a Demurrer

(e) *Aubert v. Walsh*, 3 Taunt. 277; *Tappenden v. Randall*, 2 Bos. & Pull. 467; *Cotton v. Thurland*, 5 T. R. 405; *Morris v. Robinson*, 3 Barn. & Cress. 196; *Bate v. Cartwright*, 7 Price, 540; *Thistlewood v. Cracroft*, 1 M. & S. 500.

(f) *Green v. Weaver*, ante, 1st Vol. 404.

for want of Equity, but could not have demurred to those Questions only which tended to support the Indictment. In *The Attorney-General v. Brown*, The Lord Chancellor says: "The next Question is," &c. (g). The first allegation in the Bill is that, in August 1825, *Barclay & Co.* and *Powles & Co.* respectively carried on business in partnership together: the next is that this State has been recognized. The Defendants are, at all events, bound to answer these statements: and, if there are any passages in the Bill that impute a crime to the Defendant, they form a very small part of it.

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Mr. Sugden in reply:—

The sending of Consuls has relation to Commerce only. Up to this time, three only of the Provinces of *Spanish America* have been recognized; and that has been done by solemn Treaties, and the sending of Ministers to reside in them; but *Guatemala* is not one of those States. Inquiry has been made, at the Foreign Office, and the Answer returned is that *Guatemala* has not been recognized as an independent State. The Case of *Yrisarri v. Clement* (h) was decided two years after a Consul had been appointed. With respect to the right to recover upon an illegal Contract which is not completed, if a man agrees to lend 500*l.* at usurious interest, and pays 50*l.* of it, he cannot recover it, as the offence is complete. A Party dealing with the Government of *Guatemala*, deals with it as a sovereign State; therefore the Court cannot entertain jurisdiction; as it cannot be put upon the Record that there is such a Government as *Guatemala*. The Case put of a bar-

(g) See 1 Swanst. 293.

(h) 2 Carr. & Payne, N. P. C. 223; and 3 Bing. 432.

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barous State does not apply; for this is a revolted Colony of Spain. Throughout the whole of the Bill, it is stated that the Contract was made with *Barclay & Co.* as the Agents of the *Guatemala* Government; and, when the Money was received by the Agents, it became the property of the employers. It is, then, Money raised for *Guatemala*; and this Court will give no relief, as the Contract was illegal. The Case stated at the Bar for the Plaintiff, is very contradictory to that made by the Bill. By the latter the Contract is alleged to be legal; but the Plaintiff's Counsel assert that it is illegal. If it be legal, how can it be contended that the Plaintiff is entitled to recover on the ground that it is illegal? *Green v. Weaver* was decided on the ground that the Party had given a Bond for the due performance of his duty as a Broker, which he had violated. *Thorpe v. Macauley* (i), decided that a discovery could not be compelled in aid of a criminal Action.

The VICE-CHANCELLOR :—

In consequence of the arguments in this Case, I have had communication with the Foreign Office, and I am authorized to state that the Federal Republic of Central America has not been recognized, as an independent Government, by the Government of this Country. It appears to me that, when it is stated, in the Bill, that this Republic was, and still is, a sovereign and independent State, recognized and treated as such by His Majesty the King of these Realms, it must have been meant that it has been recognized, by the Government of this Country, as an independent State altogether; and, inasmuch as I conceive it is the duty of the Judge

(i) 5 Madd. 218.

in every Court to take notice of public matters which affect the Government of the Country, I conceive that, notwithstanding there is this averment in the Bill, I am bound to take the fact as it really exists, and not as it is averred to be : and then it does not seem to me that there is any substantial distinction between the present Case, and the Case in which I formerly gave Judgment, that is, the Case of *Thompson v. Powles*.

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I observe that, in this Case, the Bill is filed for discovery only ; but it does not appear to me that the circumstance that, in one Case, discovery alone is sought, at all tends to introduce a distinction in the Judgment that has been given in a Case where the Bill was filed for discovery and relief. The Judgment proceeded, not on the question whether the Court should give relief or not, or give a discovery or not, or give discovery, and withhold relief ; but upon the question whether the King's Courts should attend to the Case of a Party who founded his Case on the representation that certain Persons did form an independent Government, recognized by this Country, when the Government of this Country did not so recognize them. It appears to me that sound policy requires that the Courts of the King should act in unison with the Government of the King. Now I apprehend that what *Lord Eldon* proceeded upon, was a general doctrine of policy, that is, that he would not allow a Person to sue, at least as a Plaintiff, in the Court of Chancery, who founded his Case upon the representation that there was that existing as an independent Government, acknowledged by this Country, which, in fact, was not so. It is impossible for me to suppose that any other than some such general principle

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as that influenced him, when I observe what his Lordship did in the Case of *Biré v. Thompson*. The Case was mentioned as an unreported Case, but I have got the very Brief, which I, as Counsel, held on an application to *Lord Eldon* in that Case. It was represented, by the Plaintiffs, that, in August 1823, the Defendant entered into an Agreement, with the Government of the Republic of *Colombia*, to take a Lease of certain Salt Mines; and then certain circumstances are stated regarding that Lease. It is stated that the Defendant had not himself Funds sufficient to complete the Contract; but, as the Contract with these Parties was a very advantageous Contract, the Defendant was desirous of completing the same; and that, about the Month of April, the Defendant came over, to this Country, to provide Funds to enable him to complete the advances to the Republic of *Colombia*, and entered into a treaty, with certain Persons, for the purpose of raising a portion of the Money for completing this Contract. It was then represented that there was an Agreement signed, which had been prepared and approved of between the Parties; and it was represented that the Plaintiff was willing to perform the Agreement; and it was asked, by the Bill, that the Defendant might be restrained, by the order and Injunction of the Court, from transferring or assigning, or agreeing to transfer or assign, the part of the Contract so entered into between him and the Republic of *Colombia* for that purpose; and this statement of the Case was verified by affidavits. And, on this Case, as it appears to me, as a matter of course, the Court would have granted the Injunction, unless there had been this objection, founded upon the representation that the original Contract was made with the Government of the Republic of *Colombia*.

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Lord Eldon thought it right to refuse the Application : and the note I have, is that the *Lord Chancellor* refused the Application because he could not take notice of the Republic of *Colombia*.

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Now, in this case, I am asked to compel the Defendant to make a discovery, to the Plaintiff, of certain proceedings, all of which are bottomed on the original representation that certain Persons were the agents of the Government of the Federal Republic of Central America, which then was and is an independent State, the fact being that it was not then, has not been, nor is now, an independent State acknowledged by the Government of this Country. It appears to me that, without saying how far the Plaintiff might have had the discovery which he asks, provided he had represented his case otherwise, yet, if he makes this fact the foundation of his Case, that this is an Independent Government, recognized by the Government of this Country, when it is not so, I must judicially take notice of what is the truth of the fact, notwithstanding the Averment on the Record, because nothing is taken to be true except that which is properly pleaded : and I am of opinion that, when you plead that which is historically false, and which the Judges are bound to take notice of as being false, it cannot be said you have properly pleaded, merely because it is averred, in plain terms ; and that I must take it just as if there was no such averment on the Record. My opinion is, without making any new Law, which I entirely disclaim, but merely meaning to follow the precedents which *Lord Eldon* laid down as bottomed on sound policy, that I must allow the Demurrer.

1828:
24th January.

BEDDALL v. PAGE (a).

*Practice.
Injunction.*

If a Defendant, who has been taken on an Attachment, still refuses to answer, the Plaintiff may, at the same time, proceed to enforce an Answer by the process of this Court, and bring an Action against him and his Sureties on the Bond given to the Sheriff under the Attachment.

THE Defendant having been taken on an Attachment for want of Answer, gave the usual Bond to the Sheriff. The Answer not being put in according to the condition of the Bond, the Plaintiff obtained an Order for a Messenger to go against the Defendant, and also took an Assignment of the Bail-bond, and brought Actions, against the Defendant and his Sureties, thereon.

Mr. *Barber*, for the Sureties, now moved for an Injunction to restrain the Actions, and contended that the Plaintiff had no right to pursue a double remedy against the Defendant, by suing on the Bail-bond, and at the same time going on with the process of this Court; and that, by having obtained the Order for the Messenger, he must be considered to have made his election to proceed in Equity, and ought therefore to be restrained from proceeding at Law.

He cited *Anon. (b)*, and a MS. Case of *Hill v. Hill*, 1821, before Sir *J. Leach*, V. C. where, after Attachment and Bail-bond given, the Answer was filed, which was afterwards excepted to, and reported insufficient; and then a further Answer was put in, upon which, Actions previously brought on the Bail-bond, were stopped.

Mr. *Sugden* and Mr. *Pattison*, for the Plaintiff, contended, 1st, that the present Motion could not be

(a) *Ex relatione.*

(b) 2 Atk. 507.

entertained at all, since the Sureties had no right to appear, except through their Principal, the Defendant, who, being in Contempt, could not himself have appeared; 2dly, that the MS. Case cited by Mr. *Barber*, did not touch the present Case; for there it was *after* Answer put in that the Action had been stopped; here no Answer had ever been put in; 3dly, that, unless the Plaintiff might, in such a case, bring Actions on the Bail-bond, the taking it was an useless expense; and, lastly, that the Plaintiff ought to be allowed to compel an Answer in every way he could.

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BIDDALL
v.
PAGE.

The *Vice-Chancellor* said that the giving of a Bail-bond would be quite useless if no proceedings could be taken on it, and refused the Motion, with Costs.

GIRDLESTONE v. DOE.

THOMAS DOE bequeathed, to *Mary Tattershall*, the yearly Sum of 40*l.*, to be paid out of the Interest and Dividends arising from his Stock in the Long Annuities, to be enjoyed by her during the term of her natural life; and, immediately after her decease, he gave and bequeathed the same unto his Nephew *James Holman*, or his Heirs. *Holman*, after the Testator's decease, and in the life-time of *Mary Tattershall*, sold and assigned, his Annuity of 40*l.*, to the Plaintiff. *Holman* died in the life-time of *Mary Tattershall*; and, upon her decease, the Bill was filed against the Defendant, the surviving Executrix of the Testator, praying that she might be decreed to transfer to the Plaintiff the Sum of 40*l.* per Ann. Long Annuities, part of the

7th February.

Will.
Construction.

Bequest of 40*l.* per ann. to *A.* for Life, and after her decease, to *B.* or his Heirs; Held, that "*or*" must be construed disjunctively; and that therefore *B.* did not take an absolute Interest in the Annuity.

1828.
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Long Annuities belonging to the Testator's Estate, or that a competent part of those Annuities might be appropriated for payment of the yearly Sum of 40*l.* assigned to the Plaintiff as before mentioned.

Mr. *Lovat*, in support of the Demurrer.

Mr. *Bellamy*, in support of the Bill, contended that the word "or" in the Bequest to the Testator's Nephew, must be construed "and," and that the Nephew took an absolute Interest under that Bequest. He cited *Richardson v. Spraag* (a), and *Read v. Snell* (b).

The VICE-CHANCELLOR:—

It appears to me that "or" must be construed disjunctively here, as the context requires it; and that the Testator contemplated that his Nephew might not be alive at the death of *Mary Tattershall*; and therefore I think that the Nephew did not take an absolute Interest in the Annuity.

(a) 1 P. W. 434.

(b) 2 Atk. 643.

MAVOR v. DAVENPORT.

1828 :
11th February.

THE Bill stated, and it was admitted by the Answer, that, at the time of the execution of the Indenture after mentioned, the Plaintiff was possessed of 1,200 *l.* her own absolute Property, and was desirous that the same should be paid to and vested in her Father, *John Mavor*, and the Defendant *Davenport*, and be settled upon the Trusts of the Indenture; that, accordingly, an Indenture, dated the 25th of July 1826, was made between *John Mavor* and the Defendant *Davenport* of the one part, and the Plaintiff of the other part, whereby, after reciting to the effect before stated, and that the 1,200 *l.* had been paid unto, and was then in the hands of *John Mavor* and *Davenport*, it was agreed and declared by and between the parties, that *John Mavor* and *Davenport* should stand possessed of the 1,200 *l.*, in Trust forthwith to invest the same, in their names, in the Public Funds, or upon Government or real securities; and that they should stand possessed of such funds and securities, upon certain Trusts for the benefit of the Plaintiff and the Children she might thereafter have: That the 1,200 *l.* were, previously to the execution of the Indenture, paid, by the Plaintiff, into the hands of *John Mavor*, on the joint account of himself and *Davenport*, upon the Trusts of the Indenture: That *John Mavor* died on the 26th of August 1826, having appointed *Davenport* his Executor: That the 1,200 *l.* remained in the hands of the Testator up to the time of his death, wholly unapplied to the Trusts

Specialty Debt.

By Deed between *A.* and *B.* it was agreed that a Sum in the hands of *A.*, but belonging to *B.*, should be laid out in the Funds, in *A.*'s name, in trust for *B.*; *A.* died, never having invested the Money: Held, that *B.* was a Specialty Creditor of *A.* for the amount.

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of the Indenture, and that the same still remained due from his Estate.

The Bill prayed that the 1,200*l.* owing, from *John Mavor*, by virtue of the Indenture, might be declared to be a specialty Debt of the Testator, and be retained, by *Davenport*, out of the assets of the Testator, in his hands.

Mr. *Rogers*, for the Plaintiff, cited *Gifford v. Manley* (a), *Primrose v. Bromley* (b), *Benson v. Benson* (c), *Maltby v. Russell* (d), and *Saltoun v. Houstoun* (e).

Mr. *Daniell*, for the Defendant.

The *Vice-Chancellor* said that the 1,200*l.* was a specialty Debt of the Testator, and that the Defendant was entitled to retain it out of the assets of the Testator.

(a) For. 109. (b) 1 Atk. 89. (c) 1 P. W. 130.
(d) 2 Sim. & Stu. 227. (e) 1 Bing. 433.

GREENWOOD v. PARSONS.

BY the Decree in this Cause it was referred to the Master to take an Account of all the dealings and transactions in Partnership between the Plaintiff and the Defendant.

1828 :
3d March.

Practice.
Examination of
Witnesses.

In order to prove that 2,500*l.* Consols, which the Defendant had purchased in his own name, and which was one of the items of the charge brought in by the Plaintiff under the Decree, had been bought with the Partnership Monies, it was necessary to prove that an Indorsement, to that effect, on the Stock Receipt, and the signature thereto, were in the hand-writing of the Defendant. For this purpose the Plaintiff examined two Witnesses, upon interrogatories, both of whom deposed that they did not believe that either the Indorsement or the Signature thereto was the Defendant's hand-writing. Upon the depositions being published the Plaintiff applied to the Master for leave to examine other Witnesses to prove the fact in question. In support of this application an affidavit was made, by the Plaintiff, and one *Parry*, an Accountant, in which the former swore that the Defendant, on some occasions, wrote in a different character or style from what he did on others, and had boasted that he could do so: That the Indorsement and Signature were in a different hand from that generally used by the Defendant: That they were written, by the Defendant, in the Plaintiff's presence, and that the Stock Receipt, with the Indorsement on it, was delivered, by him, to the Plaintiff, on the day on which it was dated, to be kept, by the Plaintiff, as

In support of a charge brought in under the Decree, two Witnesses, examined, by the Plaintiff, to prove the Defendant's Hand-writing, said that they did not believe it to be his Hand-writing: Leave was given to the Plaintiff to examine fresh Witnesses to the same point.

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evidence of the transaction. *Parry* deposed that the Indorsement and Signature were in the hand-writing of the Defendant; and two other persons made Affidavits to the same effect. The Master, however, was of opinion that he could not comply with the application without an Order of the Court. The Plaintiff now moved the Court for that Order, having given notice of his intention to read, upon the Motion, the Affidavits before mentioned. No Affidavit was filed in opposition to the Motion.

Mr. *Pepys*, and Mr. *Cooper*, for the Plaintiff, read the Affidavits, and said that, generally speaking, the Court would not allow a witness to be examined after publication past; but that there were exceptions to the rule, as in the case of surprize, where the facts could have authorized the granting of a new trial at Law: *Gage v. Hunter* (a): That, in the present case, it was not a fact, but a document that was sought to be established, *Clark v. Jennings* (b). In *Willan v. Willan* (c), Lord *Eldon*, C. says: "It is perfectly established that after publication previous to a decree, and the depositions have been seen, you cannot examine Witnesses further, without leave of the Court, which is not obtained without great difficulty; and the examination is generally confined to some particular facts." Lord *Eldon*, therefore, admits that, under particular circumstances, a new Witness may be examined after publication; and the Case of *Shepherd v. Collyer*, cited in the Judgment, is a direct authority to that effect. At Law, when the Witnesses fail to make out the Case, the Court will, on the ground of surprize upon the Plaintiff, grant a

(a) 1 Dick. 49.

(b) 1 Anst. 173.

(c) 19 Ves. 590. 592.

new Trial; or, if the Plaintiff is nonsuited, he may bring a fresh Action the next day. It must be borne in mind that the danger of allowing a Witness to be examined, after publication, to prove a Document, is not so great as it is where a particular fact is to be proved; and that the Defendant, here, does not come forward and say that this Document is not in his hand-writing.

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Mr. Horne, and Mr. Wilbraham, for the Defendant:—

The Plaintiff in this Case chose his own Witnesses, and they denied that the Indorsement and Signature were in his hand-writing; and he now seeks to contradict their testimony. In the Cases cited, the Facts to be proved had not been examined to before. The doubt here has not been created by the contradictory testimony of the Defendant's Witnesses, for they were not examined upon the subject. The Witnesses must have had considerable intercourse with the Defendant. One of them was a member of a Tontine Society, of which the Defendant was Secretary; and the other was a Member of the Committee of the same Society. The Plaintiff, in his Affidavit, says that the Defendant, on some occasions, wrote in a different style from what he usually did. The other persons who have made Affidavits say that the Indorsement and Signature are in his hand-writing, but they do not agree with the Plaintiff in saying that it is different from his usual style.

Mr. Pepys in reply:—

The transfer Receipt for the Stock in question, is in the possession of the Plaintiff. This puts the matter beyond all doubt; for why was it put into his Possession except to enable him to have the

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 v.
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benefit of the Indorsement upon it? The Plaintiff and three other Persons swear that it is in the Hand-writing of the Defendant, and he does not deny it. Neither of the Witnesses *negatives* that it is his Hand-writing: so that the Plaintiff does not ask to contradict his own Witnesses, but only to supply a defect in their testimony.

The VICE-CHANCELLOR:—

The Plaintiff has examined two Witnesses to prove the Hand-writing of the Defendant. The Witnesses say that they do not believe it to be his Hand-writing. This is rather a testification of ignorance than a denial of the fact.

On looking at what Lord *Eldon* lays down, in *Willan v. Willan*, it is quite clear that, if the point had not been examined to before, the subsequent Examination might have been allowed. But the question is, whether the Plaintiff ought, in this case, to be permitted to examine fresh Witnesses to a point that has been examined to before? Now it appears to me, that, as the previous examination did not furnish any reason why there should not be a further Examination, an order ought to be made according to the prayer of the Motion.

Motion granted, on Payment of Costs.

REECE v. STEEL.

THE Reverend *Henry Williams* devised as follows: "First, I give, devise, and bequeath, unto my niece *Charlotte Higgon*, all my Real Estate in the parish of *Lanishen*, during the term of her natural life, and to her Heirs, the Issue of her Body, for ever, during the term of their natural Lives. If my Niece has no Son, then to her eldest Daughter. There shall be no co-heiresses to any part of my Real Estate, each succeeding by priority of Birth, in case the Elder leaves no Issue; and, to all my Real Estate wheresoever situate, each Heir shall only be Tenants for their respective natural Lives, during the Term of ninety-nine years from the date of my decease; divesting all from power to sell. If my Niece marries without a Settlement of 200*l.* a year in landed Property, exclusive of what Property I leave her, or 2,000*l.* in Money vested, in the Hands of Trustees, for the benefit of Herself and Children, her own Issue, in neglect hereof her eldest Son or Daughter shall take possession, and inherit my Real Estate in the Parish of *Lanishen*, as soon as the Son or Daughter shall attain the age of Twenty-one years. If my said Niece shall leave Issue and die, her Husband, if he marries again, shall forfeit all my Real Estate to her Son or Daughter as soon as either is of the Age of Twenty-one years. My Niece's Husband must take the Surname of *Williams*. But, if my Niece *Charlotte Higgon* shall leave no Issue, then her Husband shall enjoy and possess whatever Property I leave her, during the Term of his natural Life. Until my

1828:
17th March.

Will.
Construction.

Devise to *A.* for Life, and to her Heirs the issue of her body for ever, for their Lives; and in case *A.* has no Son, then to her eldest Daughter; followed by a Proviso, containing a Devise over if *A.* left no Issue, or they should become extinct, creates an Estate-tail in *A.*

1828.

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v.

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said Niece marries, my Executors hereafter named I nominate and appoint to be her Trustees or Guardians; and they are to allow her 80*l.* a year, to be paid half-yearly; and the remainder of Rents, Issues and Profits they are to lay out in necessary Improvements of my House and Farm, under proper Securities, for her Benefit. They have power to remove Tenants, and place others, but not to lease any part of the Estate. Her eldest Son, on coming of Age, is to be allowed, out of the Real Estate, 50*l.* a year, and to be brought up a Scholar. No Timber to be cut down, unless for necessary Repairs, or what is spoiling by decay. Provided my Niece leaves no Issue, or should they become extinct, in this case, all my Real Estate, whatsoever, I give, devise and bequeath unto the elder Son of *John Wood*, my second Cousin, and to his male Heirs, for ninety-nine years. No Female shall inherit for that period; and they are to take the Surname of *Williams*, and only to be Tenants for their natural Lives for the last-mentioned Term of Years."

The Suit was instituted to compel a specific Performance of an Agreement for the Sale of the Testator's Property in the Parish of *Lanishen*. Upon the Argument of a Demurrer filed by the Defendant, the Purchaser, the question was, what Estate the Testator's Niece took under the Will in this Property?

Mr. *Bickersteth* and Mr. *Keene*, for the Defendant.

It is admitted that, unless *Charlotte Higgon* took an Estate Tail in this Property, a good Title cannot be made to it. The Testator intended to give her a Life Estate only in it, with Remainders to her First and other Sons in tail. There is, first, an express devise to

her for Life, and the word "Heirs" that follows, is descriptive of the Persons who are afterwards to take, namely, her Issue, who, in the next sentence, are mentioned to be her Sons and Daughters. *Goodtitle v. Herring*(a). The direction that no Timber shall be cut upon the Estate, and the clauses which relate to the events of the Niece marrying without an adequate Settlement, and dying without leaving Issue, are consistent with the Life-Estate expressly given to her, and show that the Testator intended her not to have any power of disposition over the Estate, but to take it for her life only.

1828.

REECE

v.

STEEL.

Mr. Sugden, and Mr. Knight, for the Plaintiffs :—

It is not disputed that the words: "Heirs of the Body," may sometimes be construed to mean: "First and other Sons;" but, under this Will, the second takers cannot be held to have Estates-tail given to them, unless the first taker is held to be Tenant in Tail. The Testator had two intentions in this Case; one was that all the Heirs of his Niece, being her Issue, should take; the other, that they should take in a particular way. It comes within the rule that is adopted, where there is a particular and a general intention, both of which cannot be effected. The general intention, here, was that every branch of the Niece's Issue should take. How can effect be given to that intention, without giving, to the first taker, an Estate-tail? It is most important to observe that, in this Case, there is a gift over on failure of Issue. *Jesson v. Wright* (b).

The *Vice-Chancellor*, at first, proposed that a Case should be stated, for the opinion of a Court of Law,

(a) 1 East, 264.

(b) 2 Bligh, 1.

1828.

REECE

v.

STEEL.

upon the Devise in question : but the Counsel having intimated to his Honor that the parties were willing to be bound by his decision, he delivered Judgment as follows :

The Testator, in this Case, has devised all his Real Estate, in the Parish of *Lanishen*, to his Niece, during her life, and to her Heirs, the Issue of her Body, for ever. These words would give the Niece an Estate-tail. But he then proceeds to explain these previous words ; and thereby creates the difficulty that exists in construing this Will. Now it is quite clear that the Gift cannot take effect in the mode intended ; for Heirs for ever never could take for their lives. But what I rely on, is that there is here, first, a Gift which would create an Estate-tail ; and then the proviso in case the Niece leaves no Issue, contains a limitation over, which, according to *Jesson v. Wright*, would clearly give an Estate-tail.

Demurrer over-ruled.

AUGUSTE DELONDRE and JOSEPH PELLETIER

v.

JOHN SHAW, HENRY SHAW, JOHN SHAW,
the Younger, and RICHARD SHAW.

1828 :
16th April.

Equity.
Injunction.

THE Bill stated that the Plaintiff, *Delondre*, had invented a very valuable and celebrated Chemical Preparation of Peruvian Bark, called *Sulphate of Quinine* : That he employed Agents in this Country to assist him in selling it here : That he agreed with the Plaintiff, *Pelletier*, a Chemist, and native of *France*, to prepare the Medicine, which he, *Delondre*, was to vend in *England*, for his sole benefit : That, for ensuring the genuineness of the Medicine, the Plaintiff caused a Seal to be engraved, after a device invented by *Pelletier*, containing the following words : “ *Produits Chimiques de J. Pelletier, J. P.*” and also a Serpent, and a Cross of the Legion of Honour of the Kingdom of *France* : That *Delondre* sold the Medicine in Bottles ; and, for the purpose of preventing fraud being committed on the Plaintiffs by spurious imitations, he caused a Plate to be engraved containing the following words : “ *Sulphate de Quinine, Auguste Delondre, neg^t. à Paris :*” That, on all Bottles containing the Medicine, there was pasted a label, containing an impression from the Plate, and that the Corks were sealed with the Seal, for the purpose of preventing spurious preparations being sold for the Preparation aforesaid, and to prevent the Plaintiffs from being defrauded thereby : That

A., the Inventor of a Medicine, employed *B.*, a Foreigner residing abroad, to manufacture it for him there, and sold it in *England* for his own sole profit. A Label and Seal, denoting that the Medicine was manufactured by *B.* and sold by *A.*, were affixed to each of the Bottles in which it was sold. The Defendants imitated the Labels and Seals. Demurrer allowed to a Bill to restrain the Imitation, and for an Account of the Sales of the spurious Labels and Seals, *A.* having no Interest.

Copyright.

The Court will
not protect a Foreigner's Copyright.

1828.

DELONDRE

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SHAW.

the Defendants were Engravers and Printers, and had, lately, engraved and printed Labels and Seals which were exact imitations of the Plaintiffs' Label and Seal, for the purpose of selling the same to the Public, with a view to their being affixed to Bottles containing *Sulphate of Quinine*, to the intent that the Purchasers thereof might be induced to believe that such *Sulphate of Quinine* was the *Sulphate of Quinine* sold by *Delondre*.

The Bill prayed for an Injunction to restrain the Defendants from copying, imitating, or selling, or exposing to sale, or parting with, the labels and seals, printed and engraved by them, or labels or seals, or impressions thereof, being colourable imitations (a) of the labels or seals, or impressions thereof, used by the Plaintiffs; and that they might account for, and pay to the Plaintiffs the Monies they had received from the sales of such spurious labels and seals, and impressions thereof.

The Defendants demurred, to the Bill, for want of Equity.

Mr. Sugden, and Mr. Loftus Lowndes, for the Defendants, in support of the Demurrer :—

The Bill does not allege that the Defendants are assisting in selling a spurious article. These Plaintiffs have no right to sue jointly. *Delondre* is the inventor of this preparation; and *Pelletier* is merely his Agent. The whole interest is in *Delondre*. It is now settled to be a good ground of Demurrer that there is a Plaintiff

(a) Qu. variations.

on the record who has no interest in the subject-matter of the Suit. *King of Spain v. Hullett (b)*. How can the Defendants be prevented from imitating what was invented in *France*? What fraud is there in the Defendants printing these labels to be put on *Delondre's* bottles. The Plaintiffs cannot say that a single label has been put on *Sulphate of Quinine* which they have not sold. The prayer is for an Injunction, and an account of what the Defendants have made by the sale of their labels. This Court grants an Injunction as ancillary only to the relief. The Plaintiffs are not dealers in labels.

1828.

DELONDRE
v.
SHAW.

Mr. *Bickersteth*, and Mr. *Pole*, for the Plaintiffs,
in support of the Bill :—

The Defendants are doing what facilitates the commission of fraud by other persons. *Pelletier*, who is a Chemist of great celebrity, is made a Co-plaintiff, not as having any interest in the Medicine, but as being entitled to prevent his name being used. When a man has affixed a mark to distinguish his own property, can any person make and vend the same articles for the purpose of deceiving the world? Then, as to the account; the Defendants have sold what the Plaintiffs have appropriated to their own use, and they have therefore sold them for the use of the Plaintiffs. In order to induce the Court to grant an Injunction, it is not necessary that there should be any act of fraud committed; but only that there should be an act of fraud threatened. *Knye v. Moore (c)*.

(b) Not yet reported.

(c) 1 Sim. & Stu. 61. See the concluding passage of the Judgment, page 65.

1828.

DELONDRE

v.

SHAW.

The VICE-CHANCELLOR:—

The Plaintiffs do not show that they are entitled to an account from the Defendants; for I cannot understand, from this Bill, that *Pelletier* has any interest in these labels and seals. The circumstance that he was the inventor of the seals, will not justify the Court in interposing in his behalf; for he was a foreigner, and the Court does not protect the Copyright of a foreigner. It appears, therefore, that *Pelletier* is not entitled to the account; and the Injunction is ancillary to the Account.

It is not alleged that there is any *Sulphate of Quinine* sold, except that which is manufactured by *Pelletier* according to *Delondre's* Receipt. The Bill does not ask an Injunction to restrain a sale of spurious *Sulphate of Quinine*; and I cannot intend a fraud where none is alleged.

The Parties who ask joint relief are not entitled to joint relief; and, on this ground, the Demurrer must be allowed.

SIMONS v. MILMAN.

IN this Case, Letters of Administration of the Effects of a person deceased, had been granted, to the Defendant, under the impression that the deceased had died intestate; whereas, in fact, he had died testate, and had appointed the Plaintiff his Executor. The object of the Bill was to recover part of the Assets of the Testator, which was in the possession of the Defendant, the Administrator; and the Bill alleged that Probate of the Will had been granted to the Plaintiff, which was not the case.

1828:
16th and 21st
April.

Pleading.
Executor.

An Executor
filed a Bill be-
fore Probate:
Plea that he
had not proved
the Will, al-
lowed.

The Defendant put in a Plea, stating that Probate had not been granted to the Plaintiff.

Mr. *Spence*, in support of the Plea, cited the following passage from 1 *Com. Dig.* Administrator, B. 1: "But if a man make a Will, and an Executor, Administration granted before Probate or Refusal is void, if the Will be afterwards proved; though it was concealed, and not known at the time of Administration granted;" and said that, as the Will had not been proved, the Plea must be allowed.

Mr. *Koe*, in support of the Bill, said that an Executor might file a Bill before he had proved the Will; and that all that was required was that he should prove the Will before the hearing of the Cause, *Humphreys v. Humphreys* (a).

(a) 3 P. W. 349. See *Humphreys v. Ingledon*, 1 P. W. 752.

1828.

SIMONS
v.
MILMAN.

The VICE-CHANCELLOR:—

When a Cause comes on to be heard, it must appear that the incipient character of Executor, which the Plaintiff has under the Will, has been perfected by proving the Will. Here an Executor files a Bill alleging himself to have obtained Probate; but it appears that he has not obtained Probate at the time when the Cause comes on to be heard; for, for the purpose of the plea, I consider it to be the same thing as if the Cause was now being heard upon Bill and Answer. The case rests upon the fact that the Plaintiff has obtained Probate in opposition to the Administration previously granted. The Case cited by the Plaintiff's Counsel, is one in which the party had not obtained Probate originally; but, before the Cause was argued, he had obtained it. The fact alleged and admitted in this Case, is that Probate has not been obtained; it therefore appears to me that I must allow this Plea.

17th April.

CAUSTON v. MACKLEW.

Vendor and Purchaser.
Title.
Judgments.

Old Judgments existing against a former Owner of Leaseholds, who parted with the Property in 1770, and to enforce which no steps appeared to have been taken, are no objection to the Title.

ON the 27th of September 1769, *William Green* purchased, and took an Assignment of, a House in *Berners-street*, in the Parish of *Mary-le-bone*, for the remainder of a Term of ninety-nine years, and, on the 23d of May 1770, he made a Mortgage of it, which afterwards became vested in *Anne Hume*, one of the Plaintiffs. *Green*, being embarrassed in his circumstances, went, some years before his death, to reside in *France*; and, in May 1804, he died there, having appointed his Wife his Executrix. *Mrs. Green* died in her Husband's life-

time; and, on the 1st of June 1824, *John Whitmore*, another of the Plaintiffs, who was the surviving Executor of a Bond and Judgment-Creditor of *Green*, took out Letters of Administration to him, with his Will annexed. In May 1825, the Plaintiffs sold the House to the Defendant. The object of the Bill was to compel a specific performance of the Contract. The Master, upon the usual reference being made to him, reported against the Title. One of the objections to the Title was, the want of Evidence that various Judgments, found to have been entered up against *Green* in the years 1768, 1769, 1770, had been satisfied.

1828.

CAUSTON
v.
MACKLEW.

The Exceptions to the Report now came on to be argued (a).

Mr. Sugden, Mr. Bickersteth, and Mr. Sharpe, for the Defendant, in support of the Exceptions :—

There is a long list of Judgments found against *Green*, who was forced to reside abroad on account of his Debts. The Court cannot know but that there may be

(a) “ Judgments do not, it seems, bind Leasehold Estates till Writs of Execution are taken out upon them, and delivered to the Sheriff; and yet, upon the purchase of a Leasehold Estate, Judgments must be searched for; because the Sheriff will not permit his Office to be searched for any Writ of Execution which may have been delivered there, lest the purposes of the Writ should be defeated, by the Party against whom it is issued absconding, or removing his goods: therefore, although the Judgment will not, of itself, bind the Leasehold Estate, yet the Purchaser cannot safely complete his Contract where he discovers a Judgment; because he cannot be satisfied that an Execution issued upon it has not been lodged with the Sheriff.”—*Sugd. Vend. and Purch.* 5th ed. 404.

1828.
 CAUSTON
 v.
 MACKLEW.

Writs in the hands of the Sheriff. The Plaintiffs are bound to show, either that the Person against whom the Judgments are entered, is not the *William Green* under whom they claim, or that no Execution has been taken out on these Judgments. By the practice of the Court of King's Bench, if a *feri facias* has been taken out within a year and a day after the Judgment has been entered, no *scire facias* is necessary to revive the Judgment, but it may be put in force by entering continuances. It is, therefore, incumbent on the vendors to prove that no Execution has been taken out; and, if they cannot do so, the Defendant is not bound to take the Title.

Mr. *Pepys*, and Mr. *Knight*, for the Plaintiffs, in support of the Report:—

No Judgment entered up subsequently to the 23d of May 1773, the date of the Mortgage Deed, can affect the Title of the Plaintiffs. The Writ, (if any), must have been lodged with the Sheriff between that time and the 29th of September preceding (*b*). No continuances have been entered, nor has any *scire facias* been taken out. No Creditor has acted upon the Judgments from the time when they were entered, down to the present day, a period of nearly sixty years. If this objection is to prevail, no Executor can make a Title to a Leasehold Estate.

(*b*) “ It is usual to search for Judgments against a Vendor, only from the time he purchased the Estate: but this practice is not correct; because Judgments bind after-purchased Lands, and will consequently affect such Lands even in the hands of a Purchaser.”—*Sugd. Vend. and Purch.* 404.

The VICE-CHANCELLOR :—

The question in this Case is, whether this Title is bad because it is possible that, between the 27th of September 1769, and the 23d of May 1770, Execution may have been taken out under these Judgments, and lodged in the hands of the Sheriff. If Execution was not taken out before the latter day, the House which the Defendant has agreed to purchase, could not be affected; as, on that day, *Green* parted with the legal Estate. For, by the 16th sect. of the Statute of Frauds, it is enacted that no Writ of Execution shall bind the property of the Goods against whom such Writ of Execution is sued forth, but from the time that such Writ shall be delivered to the Sheriff, Under Sheriff, or Coroner, to be executed. Now no evidence is produced to show that any Execution was taken out on any of the Judgments; and therefore it would be strong to presume the contrary, when nothing has been done that could be referred to Execution taken out.

1828.

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v.
MACKLEW.

Exceptions over-ruled.

1828 :
21st April.

Costs.

The Master was ordered to tax the Costs of all Parties, and the amount was directed to be paid, out of the Assets of the Testator in the Cause, by his Executors, who were to be at liberty to pay the Costs of certain Parties to *A. B.*, their Solicitor. *A. B.* was an Attorney of K. B. and C. P., but had never been admitted as a Solicitor in the Court of Chancery; and the Master, for that reason, disallowed the whole of his Charges, except what he had paid to his Clerk in Court. He had, however, previously received from his Clients, to the full amount of his Bills. The Clients then petitioned for an Order on the Master to review his Certificate, and tax *A. B.*'s Bills; but their Petition was dismissed.

PREBBLE v. BOGHURST.

SOME of the Parties to this Suit had employed *W. L. T. Robins* to act as their Solicitor, although he had never been admitted a Solicitor of the Court. *Robins* employed Mr. *Smith*, as Clerk in Court for his Clients, and was, during the whole progress of the Cause, an admitted Attorney in the Courts of King's Bench and Common Pleas. In the course of the Suit a Case was sent for the opinion of the Judges of the Court of Common Pleas.

One of the Masters having certified, in pursuance of a reference made to him by the Decree, that it would be for the benefit of the Infant Parties that the matters in difference should be referred to arbitration, the arbitrator awarded that the Costs of all the Parties should be paid, out of the Assets of the Testator in the Cause, by his Executors; and the Award was afterwards made a Rule of the Court of Chancery. The Executors then presented a Petition, praying that the Costs of all Parties might be taxed, and that they might be at liberty to pay, to Mr. *Robins*, what the Master should tax for the Costs of the Parties for whom he was acting; and an Order was afterwards made upon this Petition accordingly. Under this Order, *Robins* carried in Bills of Costs, headed with the name of the Cause, and intitled as the Bills of Costs of his Clients. The Master

disallowed the whole of these Bills, except so far as they related to Mr. *Smith*, on the ground that *Robins* had never been admitted as a Solicitor of the Court. His Clients thereupon presented a Petition stating these facts, and that, at a certain time, which was before the Award was made a Rule of Court, they had paid *Robins* the full amount at which their Costs had been taxed, and thereby became entitled, themselves, to receive to that amount, although the same had been directed, by mistake, to be paid to *Robins*. And they prayed that it might be referred back to the Master to review his Certificate, and to tax all the said Bills of Costs pursuant to the award and orders made thereon, and that they might be at liberty to except to the Certificate.

1828.
PREBBLE
v.
BOGHURST.

Mr. *Horne*, and Mr. *Wakefield*, in support of the Petition:—

Where Costs are directed to be paid to a Party in a Cause, they are the Costs of the Party, and not of the Solicitor. Where the Bill of Costs of a Solicitor is ordered to be taxed, it is done on the application of his Client. In cases where Acts of Parliament award double or treble Costs, the Party's Costs exceed those of his Attorney, and the latter gives him credit for the surplus. In a Cause and Cross-cause, the lien of the Solicitor is only on the balance of the Costs, as they are set off against each other; which would not be done if they were the Costs of the Solicitor. A Solicitor, if he is not paid his Costs by his own Client, cannot recover them from the Party who is ordered to pay them. The provisions of the statutes relating to Attornies and Solicitors, apply only as between them and their Clients; here there is no question between the Soli-

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citor and his Client. Although the Subpœna for Costs directs them to be paid to the party or bearer, the bearer must have a Power of Attorney before he can receive them (a). *Reeder v. Bloom* (b)

Mr. Sugden, and Mr. Roupell, against the Petition :—

In the Case cited, the person who acted was an Attorney, but had not taken out a Certificate. Mr. Smith received payment of all the Costs that were properly incurred. The Costs which the Order directs to be paid, are the Costs properly incurred, that is, through a Solicitor of this Court. Nobody but a Solicitor of this Court, can carry in a Bill of Costs. Others are expressly prohibited by 37 Geo. 3, c. 90. Double and treble Costs are, in fact, Damages, and payment of them could not be obtained, unless the Plaintiff had employed an Attorney. *Robins* could not have maintained an Action, against the Petitioners, for his Costs; the Act of Parliament prohibits it. These Petitioners are entitled to be paid the Costs they have properly incurred, namely, those of the Clerk in Court; but, as to the others, there was no Debt contracted, because *Robins* was doing what the Law prohibited. Admitting that the Costs are the Costs of the Party, still they must be incurred to a Solicitor. The question is, whether there was an obligation, upon the Petitioners, to pay these Costs. Now it is admitted that *Robins* could not have maintained an action for them; but then they say that they have paid him. They however can have no

(a) Pract. Reg. 406, and Beames on Costs, 249.

(b) 3 Bing. 9.

higher right than *Robins* had; they have, therefore, paid what was not legally due; and, as *Robins* had no right to enforce payment, they can have no demand.

The VICE-CHANCELLOR:—

It never could be intended, by the Order for taxing the Costs of the Parties in this Cause, to make it imperative on the Master to receive a Bill of Costs, which has been carried in by a person who was not a Solicitor at the time when any portion of the Costs was incurred. This Court would not allow a person to have his Bill of Costs taxed as a Solicitor, who, in point of fact, was not a Solicitor; and I therefore think that the Master's Certificate is right.

1828.

PREBBLE

v.

BOGHURST.

BARKER v. BARKER (a.)

RICHARD BOWYER SPENCE, deceased, devised as follows: "I give and devise all and every my Messuages or Tenements, Buildings, Closes, Pieces or Parcels of Land or Ground, and Hereditaments, with the Appurtenances, situate at *Bodymoor Heath*, in the Parish of *Kingsbury*, unto my Nephews and Niece, *Richard Barker, William Barker, Lewis Barker, James Barker, Ann Barker, Thomas Bloor, and William Bloor*, and their Heirs and Assigns for ever, to take and hold as tenants in common, and not as joint-

22d and 23d
April.

Will.
Construction.
Tenant by the
Curtesy.

Devise to *A.* and her Heirs; but if she died leaving Issue, then to such Issue and their Heirs. *A.* died, leaving Issue. Held, that her Husband was not entitled to be Tenant by the Curtesy.

(a) The Editor, owing to difficulty experienced in procuring the Briefs, has been unable to insert this, and some of the other Cases contained in this Part, according to their Dates.

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BARKER

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tenants: provided also, and I do hereby declare that if any one or more of my said Nephews and Niece shall happen to die, leaving lawful Issue of his or their body or bodies, then and in such case I give and devise the Share or Part, or Shares or Parts of him, her or them so dying, leaving such Issue as aforesaid, of and in my said Messuages, Lands and Premises at *Bodymoor Heath* aforesaid, to and among his or their Child or Children, and his, her or their Heirs and Assigns, if more than one Child, to take and hold as tenants in common, and not as joint-tenants; but if but one, then to such one Child, his or their Heirs and Assigns."

The Testator made a Codicil, which was partly as follows: "Whereas, by my said Will, I gave and devised all and every my Messuages or Tenements, Buildings, Closes, Pieces or Parcels of Land or Ground and Hereditaments, situate at *Bodymoor Heath*, in the Parish of *Kingsbury* aforesaid, unto my Nephews and Niece, *Richard Barker, William Barker, Lewis Barker, James Barker, Ann Barker, William Bloor* and *Thomas Bloor*, their Heirs and Assigns for ever, as tenants in common, and not as joint-tenants; now I do hereby revoke the said Gift and Devise, and do hereby give and devise all and every my said Messuages or Tenements, Buildings, Closes, Pieces or Parcels of Land, Hereditaments and Premises, situate at *Bodymoor Heath*, unto my said Nephews and Niece, *Richard Barker, William Barker, Lewis Barker, James Barker, Ann Barker, William Bloor*, and *Thomas Bloor*, and their Heirs and Assigns, for ever, in the same manner, and subject to the proviso mentioned in my said Will; and also subject to the payment of all and every my Debts

due from me to any Person or Persons on Bonds or Notes."

1828.

BARKER

v.

BARKER.

Ann Barker married *William Saunders*, and died some time after the Testator. There was Issue of the Marriage two Sons. The Testator's Estate at *Body-moor Heath* having been sold, under the Decree in the Cause, for payment of the Debts with which it was charged, *Saunders* claimed to be entitled, as Tenant by the curtesy, to the Dividends and Interest of his late Wife's Share of the Surplus of the Purchase-money.

Mr. Duckworth, for the Children of *Mr. and Mrs. Saunders*, contended that *Saunders* was not entitled to be tenant by the curtesy of the Share in question; he cited *Sumner v. Partridge (b)*.

Mr. Knight appeared for *William Saunders*, and cited *Buckworth v. Thirkell (c)*, and *Moody v. King (d)*.

Mr. Sugden, *Mr. Phillimore*, and *Mr. Norton*, appeared for some of the other Parties in the Cause.

The VICE-CHANCELLOR:—

The question that was argued before me in this Case, arose on this passage in the Will: "I give and devise all my Messuages or Tenements, Buildings, &c." It appears that one of the Devisees married, and died, leaving Issue; and the question is, whether her Husband is entitled as Tenant by the curtesy. Now that depends upon what is laid down by *Little-*

23d April.

(b) 2 Atk. 47.

(c) 3 Bos. & Pull. 652, note.

(d) 2 Bing. 447. See 2 Roper on Bar. & Feme, Mr. Jacob's ed. Addenda, No. 2.

1828.

BARKER

v.

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ton, sect. 35. So that the question is reduced to this ; whether the Wife, who has Issue, has such an estate, as, on her dying, the Issue will inherit.

It was said that this Case was decided by *Sumner v. Partridge*, where there was a devise to *A.* and her heirs, and, if she died before her Husband, he was to have 20*l.* a year for life, remainder to go to her Children. *A.* did die before her Husband ; but the Court held that he was not Tenant by the Curtesy. In opposition to that Case, two Cases were cited. The first was *Buckworth v. Thirkell*, where an Estate was devised to Trustees, in trust for *Mary Barnes*, till she attained twenty-one or married, and then to the use of her and her Heirs, with a devise over, in case she died under the age of twenty-one, and without leaving Issue. The events were that she married, and had a Child ; the Child died, and then the Mother died under twenty-one ; and the question was, whether the Husband was entitled to be Tenant by the Curtesy ; which entirely depended upon whether she had such an Estate, as, by possibility, her Issue might inherit. That Case was twice argued ; and Lord *Mansfield* says that, during the life of the Wife, she continued seised of a Fee-simple to which her issue might, by possibility, inherit ; and had she attained twenty-one, her vested Estate would have descended on her Issue. The consequence was, that her Husband was held to be entitled to be Tenant by the Curtesy. The second Case was *Moody v. King* ; where there was a devise to *W. Frost*, and his Heirs ; but if he should have no Issue, the Estate devised was, on his decease, to become the Property of the Heir at Law. Now it is manifest that *W. Frost* had an Estate that might have descended on his Issue, and that, on

his dying without Issue, that Estate determined. But it was, nevertheless, held that his Widow was dowable. But these two Cases are distinguishable from *Sumner v. Partridge*, and from the one now under consideration. For, in *Sumner v. Partridge*, and the Case now before me, the Children take by force of the gift: in the two other Cases, the devise over was to other persons. It is clear, therefore, that the Estate which the wife had is determined by her dying leaving Issue, by which the Children take, as purchasers, by force of the gift. Therefore the Wife had not such an Estate as could descend to her Children, they taking as purchasers. The consequence is, that the Husband is not entitled to be Tenant by the Curtesy.

1828.

BARKER
v.
BARKER.

GORDON v. CALVERT.

2d May.

IN May 1820, *Alexander Gordon*, together with *Richard Edwards* and *Samuel Kent*, executed a joint and several Bond, to the Defendants *Calvert* and *Foster*, in the penalty of 2,000 *l.*: and, after reciting that the Firm of *Felix Calvert and Co.* had agreed to take *Edwards* into their service, as a collecting Clerk, in their business of a Brewer, the condition of the Bond was declared to be, that if *Edwards* should, during his continuance in the service of the Firm, duly account for all Monies received by him on their account, then the Bond should be void.

Principal and Surety.

A., on taking *B.* as a Clerk, took a Bond from him and a Surety, to secure his duly accounting for his Receipts. No time was fixed for the continuance of the Service, but it was to be determinable at the

option of either Party. The Surety died. His Executrix gave notice to *A.* that she should no longer consider herself liable on the Bond. *A.* read the notice to *B.*, and required him to execute a new Bond, with another Surety, which was done. Then *B.* died, and Deficiencies were found in his Accounts, subsequent to the notice. An Injunction obtained, as of course, by the Executrix, to restrain an Action on the Bond, was dissolved.

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Edwards was not taken into the service of the Firm for any definite period of time, but only during the pleasure of his employers, and he was at liberty to quit their service, at any time, at his own pleasure.

Gordon died in October 1821, and, shortly after his decease, the Plaintiff, his widow and Executrix, wrote a letter to the Firm, by which she informed them of the death of her Husband, and that she should not consider herself liable, as a Surety for *Edwards*, any longer. The letter was received by the House of *Calvert and Co.*, and its contents were communicated, by one of the Partners, to *Edwards*, and a conversation took place between them on the subject of the letter, but no answer was returned to it.

In consequence of the death of *Gordon* and the receipt of the letter, *Calvert and Co.* required further Security from *Edwards*: upon which he procured a Mr. *James Ives Edwards* to become Surety for him; and, in January 1822, *James Ives Edwards* executed to the Defendants, *Calvert and Foster*, a Bond in the penalty of 2,000 l., with a condition to the same effect as the condition of the former Bond. This new Bond recited the Bond of May 1820, the death of *Alexander Gordon*, and that *Edwards* had, thereupon, proposed to *Calvert and Foster*, that *James Ives Edwards* should enter into the new Bond, as an additional and further Security with the recited Bond, for the purposes in the condition thereof expressed, to which *James Ives Edwards* had consented.

Kent, the other Surety in the Bond of May 1820, and *James Ives Edwards* both afterwards died, but, on

neither of their deaths was any further security required from *Richard Edwards*, by *Calvert and Co.* In May 1826, *Richard Edwards* himself died, and after his death, deficiencies were discovered in his accounts, to the amount of between 1,700 *l.* and 1,800 *l.*, all of which, except some trifling sums, arose after the receipt, by the Defendants, of the Plaintiff's letter.

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The Bill, after stating these facts, prayed for an injunction to restrain an action on the Bond, brought by the Defendants against the Plaintiff, and that the Bond might be delivered up.

The answer admitted the statements of the Bill; but said that the Defendants did not recollect the particulars of the conversation referred to in the Bill, and that they did not, by requiring the further security, intend to release either *Gordon's* Estate, or the plaintiff, as his executrix.

The Plaintiff obtained the common Injunction for want of an answer; and the Defendants having afterwards put in their answer, and obtained the rule *nisi* for dissolving the Injunction, the Plaintiff now showed cause on the merits.

The *Attorney-General*, Mr. *Treslove*, and Mr. *Swann*,
for the Plaintiff:—

In consequence of the letter written by the Plaintiff to *Calvert and Co.*, the Bond of January 1822 was substituted for the prior one. How then can *Gordon's* Estate be liable for any defaults except those that happened prior to the sending of that letter. The Action, however, has been brought, against the Plaintiff, for

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defaults committed subsequent to the receipt of the letter, and to the substitution of the new Bond for the original one. By the condition of that Bond, no time was fixed for holding the parties to their liability. *Calvert and Co.* were at liberty to discharge *Richard Edwards* whenever they thought proper. Why was not the Surety to have the same liberty to discharge himself from his liability (a)? *Wright v. Morley* (b), *Wright v. Simpson* (c).

The Case of *Shepherd v. Beecher* (d) will be cited for the Defendants. But that Case is distinguishable from this; for there the security was given for a definite period of seven years. Suppose that *Edwards* had been guilty of embezzlement, and that *Calvert and Co.* had continued to employ him, would not the Plaintiff have had a right to insist upon their determining her liability; and, if she had that right under one state of circumstances, why might she not have the same right under another state of circumstances? *Calvert and Co.* led her to suppose that the notice was sufficient. They read over the letter to *Edwards*, and required him to procure a new Bond. Under these circumstances the Plaintiff's liability ceased on the receipt of the letter.

Mr. *Sugden*, and Mr. *Garratt*, for the Defendants, were stopped by the Court.

The *Vice-Chancellor*, after stating the Case, said that, by the original Contract, the liability of the Surety was to continue as long as *Calvert and Co.* kept *Richard*

(a) Comes *Ranelagh v. Hayes*, 1 Vern. 190.

(b) 11 Ves. 12. (c) 6 Ves. 714. (d) 2 P. W. 288.

Edwards, or he chose to remain in their service: That after *Calvert and Co.* had received the Plaintiff's letter, they never gave her any intimation that they did not consider her as continuing liable under her Husband's Bond: That their conduct did not operate, in any manner, upon her: and that therefore the Injunction ought to be dissolved.

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WILLIAMS v. THORP.

5th May.

BY a Policy of Insurance, dated the 27th of October 1798, under the hands and seals of two of the Trustees of The Equitable Assurance Society, the Trustees, in consideration of the annual Premium of 27*l.* 5*s.* 6*d.* to be paid by *John Newman*, assured unto him the Sum of 1,000*l.* to be paid to his Executors, Administrators, and Assigns, within six months after his decease.

Bankrupt. Policy of Assurance.

The assignment of a Policy of Assurance on a Life does not take it out of the order and disposition of the Assignor, if no notice of the Assignment is given to the Insurers.

Newman being indebted to the Defendants *Joseph Thorp*, and *John Thomas Thorp*, and *Charles Henry Thorp*, deceased, by an Indenture dated the 8th of August 1820, assigned this Policy, together with another Policy of the London Life Assurance Company, to *Charles Henry Thorp*, and *Joseph Thorp*, subject to redemption upon payment of 2,030*l.* and Interest.

Soon after the Execution of the Assignment, *Newman* having paid off part of the Debt, *Charles Henry Thorp* and *Joseph Thorp* delivered up to him the Policy effected with the London Life Assurance Company, but retained possession of the other Policy, as a Security for the remainder of the Debt.

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No notice of the Assignment was ever given to the Equitable Assurance Society. In November 1821, *Newman* became a Bankrupt, and the Plaintiffs were chosen his Assignees. The Policy was afterwards sold, by Auction, to Mr. *Briggs* for 1,000 *l.* *Briggs* and the Auctioneer were made Defendants to the Bill ; but, upon the deposit and balance of the Purchase-money being paid by them into Court, and an Assignment of the Policy being executed to *Briggs*, by all proper parties, the Bill was dismissed as against them.

The Bill alleged that the Bankrupt, at the time of his bankruptcy, was left in the apparent ownership of the Money secured by the Policy, and that the right thereto, thereupon, passed to the Plaintiffs as the Assignees under the Commission.

The Bill prayed that the *Thorps* might be ordered to join, with the Plaintiffs, in an assignment of the Policy, to *Briggs*, and to deliver it up to him upon payment of his Purchase-money ; and that the Plaintiffs, as Assignees of the Bankrupt, might be declared to be entitled to receive such Purchase-money ; and that the same might be paid to them accordingly.

The Defendants, by their Answer, said that assignments or transfers of Policies of Assurance granted by the Equitable Assurance Office, were never entered in any Books belonging to that Society, or in any manner noticed by it ; and that there was not any rule or regulation of the Society, requiring them to be so entered, or any Book kept, by the Society, for any such entry ; but that all right and interest in and to every Policy of Assurance was effectually assigned by the delivery of

the Policy of Assurance, and the usual assignment thereof; and that it never was, nor is, necessary for any person to whom such assignment is made, to have his name entered in any Book belonging to the Society, or to be in any manner known, to such Society, as the holder of the Policy: That, at the time, and on the occasion of the execution of the Assignment, *Newman* delivered to *Charles Henry Thorp*, and the Defendant *Joseph Thorp*, the Policy of Insurance effected at the Equitable Office, and also the other Policy; and that the former Policy had continued in the possession of *Charles Henry Thorp*, and *Joseph Thorp*, during the life of *Charles Henry Thorp*, and that, since his decease, it had been, and was then in the possession of the Defendant *Joseph Thorp*: That no notice was given to the Equitable Assurance Company, or their Trustees or Agents, of the Assignment of that Policy, nor was any entry of such Assignment made, in the Books of the Company, but that *Joseph Thorp* had paid to the Equitable Assurance Company, the two years annual Premium which became due on the Policy, in the Months of October 1822 and 1823; and that, according to the Rules and Regulations of the Equitable Society, it was not necessary, in order to give effect and validity to the Assignment, that the same should be entered in any Book belonging to such Society, and that, in fact, the Equitable Society had not any book wherein to enter the assignment of their Policies; and that, when assignments of their Policies were made, it was not usual or necessary, in any manner, to apprise the Society of such assignments: That, at the time of the issuing forth of the Commission of Bankruptcy, *Newman* was indebted to *Charles Henry Thorp* and *Joseph Thorp*, in the Sum of 1,400*l.* being the residue, then remaining due,

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of the Debt, for the securing of which, *Newman* had executed the Assignment and delivered to them the Policies of Insurance; and that, at that time, the Policy effected with the Equitable Society, was in the hands of *Charles Henry Thorp* and *Joseph Thorp*, as a Security for their Debt; and that, therefore, the Bankrupt was not, at the time of his Bankruptcy, left in the apparent ownership of the Policies, or of the Money secured by it; and that the right thereto did not pass to the Plaintiffs, as the Assignees under the Commission: That there was still due and owing to *Joseph Thorp*, as having survived *Charles Henry Thorp*, upon the Security of the Assignment, the Sum of 1,460*l.* including the Premiums paid on the Policy since the assignment thereof.

Arthur Morgan, who was both a Clerk and joint Actuary of the Equitable Office, was examined for the Defendants. He deposed that it was not usual or customary, and that the Rules and Regulations of the Society did not require that, in order to give effect or validity to Assignments of their Policies, Notice should be given of such Assignments to the Society: that although notice of Assignments of Policies effected with the Society, was sometimes given to the Society, yet the Society had not any Books or Registers of such notices.

Mr. *Sugden*, and Mr. *Pemberton*, for the Plaintiffs:—

It has been decided that, if upon the Assignment of a Debt no notice of the Assignment is given to the Debtor, the Debt remains in the order and disposition of the Assignor (*a*). It may be said, that the Equitable Assurance Society is a partnership: and so it is, for it is

(*a*) *Ex parte Monro*, 1 Buck. 300.

a Company formed for mutual Assurance. But how does that differ the Case? It is immaterial in what manner the party to be paid is connected with those who are to pay him. Can a Partner assign his Share without Notice to his Co-partners? Where Debts due on the dissolution of partnership are assigned without notice, they remain in the order and disposition of the Assignor. *Ex parte Usborne (b)*. The question here is, whether the assignment of this Policy, without Notice to the Trustees of the Society, takes it out of the order and disposition of the party who makes the Assignment. The Assignment is a valid one, although the thing assigned is not taken out of the order and disposition of the Assignor. If the Insurer had died within an hour after the Assignment, and no notice of the Assignment had been given to the Trustees, they might have safely paid the sum insured to his Executors. So, if the Company had purchased the Policy after it had been assigned without notice to them, it would have been binding upon the Assignee, because he had not done all that was necessary to prevent the Assignor from receiving the amount of the Policy. The Society, not having notice of the Assignment, might have safely paid it to the Assignor, and therefore the policy remained in his order and disposition.—The *Vice-Chancellor*. The Policy was actually delivered to *Charles Henry Thorp* and *Joseph Thorp*.

It was so : but if the Policy had been lost, the Company would, upon proper evidence of that fact, have paid the amount to the Insurer. The delivery of the Policy does not take it out of the order and disposi-

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(b) 1 Glyn & Jam. 358.

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tion of the Insurer. To produce that effect, notice of the Assignment must be given to the Society. *Ex parte The Vauxhall Bridge Company* (c). There is no difference between this Policy and a Post Obit Bond.

Mr. *Horne*, and Mr. *Barber*, for the Defendants:—

A Bond and a Policy of Insurance stand on quite a different footing. A Bond is altogether personal. No property is, either directly or indirectly, connected with it, but as it may be recovered by putting the Bond in suit. A Bond is an existing debt; nothing further is required to keep it in force. On a Policy, Premiums are to be paid, yearly, to keep it on foot.

The Policy is a Covenant with the insured and his Assigns; the latter, therefore, may maintain an action on the Policy against the Insurer. No person can claim the sum insured except according to the tenor of the Policy; therefore neither *Newman* nor his Assignees can strike the word “Assigns” out of the Instrument, and say that it is not an assignable interest.

The VICE-CHANCELLOR:—

Does the Deed, constituting the Society, contain any Stipulation as to the assignment of Policies?

None at all. It appears, by *Morgan’s* Evidence, that if notice had been given of the Assignment, it would not have been attended to. Notice amounts to nothing, unless the Office could be affected by it. The Bank of England is never bound by notice, on account of the

extent of its Transactions. *Ex parte Richardson (d)*: how, then, can the equitable Office be held to be bound by it? The Office would not have purchased the Policy, nor could any one have obtained payment of the sum insured, without a production of the Policy, and of the Receipts for the Premiums. Every thing has been done, in this Case, that the nature of the Property admitted of to vest the Policy in these Defendants.

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The VICE-CHANCELLOR:—

The question in this Case is concluded by the Decisions in the Cases that have been cited for the Plaintiffs.

In *Ex parte Monro*, The Vice-Chancellor says: “ Did the delivery of the Bond by the Bankrupt, take away his power to receive the Debt? Certainly not.” Supposing that the Executor of *Newman* had obtained payment of the sum insured from the Office, could the Office have been compelled to pay it over again to *Thorp*? I see no ground upon which the Office could have been compelled to make a second payment. If this Society does not take notice of Assignments, it takes all the risk of such conduct upon itself. It appears to me that the question that has been discussed, is concluded by authority.

Declare the Plaintiffs entitled to the benefit of the Policy of Insurance.

(d) 1 Buck. 480.

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Trust.

A Trust for Sale vested in *A*, and his Heirs, cannot be executed by an assign of *A*.

*Will. Construc-
tion.*

Testator gave, to his heir, one shilling, and devised to *W. B.* all his lands ; and, in the next sentence, gave to him all his goods, chattels, personal and testamentary estate : held that the fee-simple of the lands past to *W. B.*

BRADFORD v. BELFIELD.

BY Indentures of Lease and Release, dated the 9th and 10th of October 1794, *Nicholas Prout Berry*, in order to secure the re-payment of a sum of Money advanced to him by *William Baker*, conveyed an Estate, in *Devonshire*, to *George Whidborne* (a Trustee for *Baker*) his Heirs and Assigns ; and, by the Indenture of Release, it was provided and declared that the conveyance was so made as aforesaid to *Whidborne* and his Heirs, upon special trust and confidence in him the said *George Whidborne* and his Heirs reposed, and to the intent and purpose only that he and they should, as soon as to him and them should seem meet, upon request to him or them for that purpose made by *Baker*, his Executors, Administrators and Assigns, make absolute sale and disposal of the Fee Simple and Inheritance of the Estate, in such lots as he and they should think proper, and, out of the Purchase-money, in the first place, deduct to him the said *George Whidborne*, his Heirs, Executors and Administrators, the Expenses of executing the Trusts, and next, to pay to *Baker* the Principal and Interest due to him : And it was provided that the Purchasers under the Indenture, paying their Purchase-money to *Whidborne*, his Heirs, Executors, Administrators and Assigns, should not be obliged to see to the application thereof ; but that the Receipts of *Whidborne*, his Heirs, Executors, Administrators and Assigns, should be sufficient discharges to them for the same.

Whidborne afterwards died intestate as to the Estate in question. *Nicholas Prout Berry*, by his Will, dated the 25th of January 1803, and duly executed and attested to pass Real Estates, gave to his Brother, *Thomas Berry* (his Heir at Law) the sum of One Shilling; to his Brother, *George Berry*, the sum of 10*l.* a year, to be paid out of two fields, called *Rorsden* and *Ridge*, (which were no part of the Estate in question): and then concluded his Will in the following words:—
“ I give, unto my Brother, *William Berry*, all my Lands, Messuages and Tenements whatsoever; also all singular my Goods and Chattels, Personal and Testamentary Estate whatsoever, I give and bequeath unto the said *William Berry*, whom I make and constitute whole and sole Executor of this my last Will and Testament.”

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BELFIELD.

After the Testator's decease the Executors of *Baker*, (who was then also dead) assigned, the Principal and Interest secured by the Indentures of October 1794, to the Plaintiff, *Nicholas Baker*; and, in November 1815, *Whidborne's* Heir, at the request, and by the authority of the Executors only, conveyed the Estate to the Plaintiff, *Bradford*, in fee, in trust to sell, and out of the proceeds of the Sale, to pay the Principal and Interest to *Nicholas Baker*. By a Deed dated in April 1823, *William Berry* claiming to be entitled to the Property under the Will of *Nicholas Prout Berry*, subject to the Conveyance made in 1794, in consideration of a further advance of Money made to him by *Nicholas Baker*, confirmed the Estate vested in *Bradford*, and gave him new powers of sale for raising the Money originally lent by *William Baker*, and also the sum afterwards lent by *Nicholas Baker*.

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 —————
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In September 1823, *Bradford*, in performance of the trust reposed in him, sold the Estate to the Defendant *Belfield*: and he having refused to complete his purchase, this suit was instituted to compel him to do so. The *Master* to whom the title had been referred under the Decree reported in favour of it; upon which the Defendant excepted to the Report.

Mr. *Sugden*, and Mr. *O. Anderdon*, for the Defendant, in support of the Exceptions:—

The Power of Sale in the Release of 1794, is a very peculiar one. The Plaintiffs contend that it authorized a sale by *Bradford*; but that we deny. *Whidborne* and his Heirs might have sold the Estate, but his Assigns could not: for the power of selling is confined to *Whidborne* and his Heirs. The Trust vests an important discretion in *Whidborne*, by authorizing him to decide as to the Lots in which the Estate was to be sold. *Townsend v. Wilson* (a), *Hall v. Dewes* (b), *Sharp v. Sharp* (c), *Perkins*, Sect. 553, *Keilway*, 43, b., *Mansel v. Mansel* (d).

Then another point is made, namely, that the Devisee of *Nicholas Prout Berry* confirmed the Estate and the Powers of Sale vested in *Bradford*. But the question is, whether the Fee-simple did pass to the Devisee under that Will. The Testator makes two Gifts, in two distinct sentences. The former sentence relates to the Testator's Real Estate, which is disposed of in words not sufficient to pass the Fee-simple. The expression, "Testamentary Estate," therefore, which is used in

(a) 1 B. & A. 608. (b) Jacob's Rep. 189. (c) 2 B. & A. 405.
 (d) Wilmot's Cases, 36.

the latter sentence, cannot relate to Lands; *William Berry*, therefore, takes a Life-interest only in the Testator's Real Estate. *Smith v. Coffin* (e), *Doe v. Gilbert* (f), *Doe v. Buckner* (g).

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Mr. Preston, and Mr. Ching, for the Plaintiffs, in support of the Master's Report:—

The word "Estate," in whatever part of a sentence it may be found, has been always held to relate to Real Estate, especially where it is coupled with the word "Testamentary." *Ibbetson v. Beckwith* (h), *Tanner v. Morse* (i). It is a clear and acknowledged Rule that, in construing a Will, effect must be given to all the words, and none be rendered nugatory. But if the words "Testamentary Estate" do not carry realty, then some of the words in this Will will be rendered nugatory. The gift of a Shilling to the Heir, shows that the Testator intended to disinherit him. *Doe v. Lainchbury* (k), *Doe v. Langlands* (l), *Patton v. Randall* (m), *Huxtep v. Brooman* (n), *Tilley v. Simpson* (o), *Hogan v. Jackson* (p), *Doe v. Gilbert* (q).

Next as to the other question: whether this Trust is of such a nature as to be incapable of being delegated. If *Whidborne* had devised this Estate, specifically, can it be denied that the Devisee would have been the person to execute the Trust? The nature of this Trust is not so personal that it cannot be delegated. The object of the

- (e) 2 H. Black. 444. (f) 3 Brod. & Bing. 85.
(g) 6 T. R. 610. (h) Ca. Temp. Talb. 157. (i) Ibid. 284.
(k) 11 East, 290. (l) 14 East, 370. (m) 1 Jac. & Walk. 189.
(n) 1 Bro. C. C. 437. (o) 2 T. R. 659, note.
(p) Cowp. 299. (q) 3 Brod. & Bing. 85.

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Trust was only to raise Money. The Mortgagee nominated the Trustee. Then how can he be held to be the confidential Trustee of the Mortgagor? If the Trustee had proceeded to make an improvident sale, he might have been enjoined by this Court. It is admitted that *Whidborne's* Heir might have sold; and so might the Heir of that Heir. What was the special confidence reposed in them? In that part of the Trust for sale which authorizes the deduction of the expenses, the words: "Heirs, Executors, and Administrators" are used, and, in the Proviso as to the Receipts, the same words occur. Then, surely, it is to be supposed that the word "Heirs" in the former part of the Trust, must be held to extend to Assigns. It is not merely a Power, but a Trust; and what reason could there be to enable the Assigns to give Receipts for the Purchase-money, if they were not to sell the Estate.

The Deed of 1823 cures any defect that might arise under the Release of 1794.

Mr. Sugden, in reply:—

The object of interposing a Trustee was that he might be a safeguard to the Mortgagor. The trust for sale is, in every part of it, limited to the Heirs of *Whidborne*. But it is said that the word "Heirs" includes Devisees. That I do not admit. *Cole v. Wade* (r). There was a personal confidence reposed here; and no two persons might, perhaps, agree as to the proper time and mode of sale. But supposing that the Devisee of *Whidborne* might have executed the Trust, there is no such Devisee here. The Heir has no greater power

than the Ancestor had; and if the Ancestor could not have transferred the Trust, the Heir could not do it. Now it is clear that the Ancestor could not have appointed a new Trustee.

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As to the argument raised upon the use of the word "Assigns" in the receipt-clause, it is answered by the decision in *Townsend v. Wilson*, which was followed by Lord Eldon, C. in *Hall v. Dewes*.

Next as to the effect of the Devise to *William Berry*. In *Smith v. Coffin*, there was nothing for the words to operate upon, except the Estate in question in that Cause. *Doe v. Gilbert* is a very unsatisfactory decision. It was decided upon the introductory words of the Will. Here it is conceded to us that, under the words: "I give unto my Brother *William Berry*, all my Lands Messuages and Tenements whatsoever," an Estate for life only passed; and it may be fairly inferred, from what *Richardson, J.* is reported to have said in delivering his Judgment in *Doe v. Gilbert*, that, if that learned Judge had had to decide this Case, he would have held that the fee did not pass to *William Berry*. I apprehend that there is some inaccuracy in the Report of the Judgment referred to. It is quite clear that the opinion of the learned Judge was founded on the Introductory Clause. The giving of a shilling to the Heir can not be adverted to, either with regard to the Real or the Personal Estate. It has been decided, after great consideration, in *Doe v. Dring (s)*, that a Devise of all a Testator's Effects of what nature or kind soever, will not

(s) 2 M. & S. 448.

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pass a Real Estate, where it cannot be collected from the Will, that the Testator intended that it should pass. Nobody can doubt that the Testator, in this Case, thought that he had given his Real Estate under the Devise of all his Lands, Messuages and Tenements whatsoever; besides the appointing of Executors is included in the same sentence as the subsequent Gift. As it cannot be denied that, under the word "Goods," all the Personal Estate passes; the words Personal and Testamentary Estate, which are coupled together, are surplusage. It was decided in *Roe v. Yeud* (t), that, although the words: "all the remainder of my Property," would have passed Real Estate, if taken abstractedly, yet they were so connected with other words in the Will, that they could not pass it.

At all events, the questions in this Case are of too grave a nature for the Court to compel a Purchaser to take the Title.

The *Vice-Chancellor*, after stating the Trust for sale, the Receipt Clause in the Release of 1794, and the Conveyance by *Whidborne's* Heir to *Bradford*, and remarking, that the Heir of *Nicholas Prout Berry*, was not a party to it, continued as follows: The question is, whether *Bradford*, who was the Assign of the Heir of *Whidborne*, is able to make a title to the Estate contracted to be sold. It has been argued that, notwithstanding the Trust is, by the words of the Deed, expressly confined to *Whidborne* and his Heirs, according to the true construction of the Instrument, his Assigns might make the sale, especially as the proviso makes

(t) 2 N. R. 214.

the receipts of his Assigns sufficient discharges for the Purchase-money.

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The necessity of discussing this point upon principle, is superseded by the decision of the Court of King's Bench in *Townsend v. Wilson*, and, as the Judgment in that Case remains unreversed, it decides the question now under consideration. It has been correctly stated that, in *Hall v. Dewes*, Lord *Eldon*, C. did not approve of that decision: but his Lordship felt himself bound by it, so that he would not compel the Purchaser, in that Case, to take the Title. Now, in *Townsend v. Wilson*, the power of sale was given to three Trustees and their Heirs; and the Money to arise by the sale was directed to be paid to the Trustees and the survivors or survivor of them: so that, in that Case, there was the very distinction that occurs in this. One of the Trustees died; and the power was exercised by the two survivors: and the question was, whether that was a good execution of the power. The Court of King's Bench determined that it was not a good execution of the power. I, therefore, feel myself bound by the authority of *Townsend v. Wilson*, to say, that, as far as the first point is concerned, the Title is not good.

But it is admitted that the defect will be cured, if the Court should be of opinion that, under the Will of *N. P. Berry*, the equitable fee passed to *William Berry*.

Now *N. P. Berry* made his Will, by which, &c. [His Honor here read the Will]. If I had to determine the point myself, I should feel bound, by the decision of the Court of Common Pleas in *Doe v. Gilbert*, to hold that, under this Will, the Inheritance of the Lands did

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vest in *William Berry*; for it appears to me that there is no substantial distinction between the terms of the Devise in question, and of the one in the case referred to. The difference between the two Wills consists in this; the one begins with an expression of intention to dispose of the whole of the Testatrix's Temporal Estates, but contains no gift of a nominal Sum to the Heir at Law; the other has no introductory Clause, but contains a gift of a Shilling to the Heir. Now, though the gift of a nominal sum to the Heir may not have the effect intended, namely, to disinherit the Heir, yet it may be received to aid the construction of doubtful words. Upon the whole, therefore, I see so little substantial distinction between the two cases, that, if it were left to me to decide, I should say that the Devise to *William Berry* has had the effect of curing the defect in the Title. I do not, however, feel myself authorized to compel the purchaser to take the Estate; but, as the question is, in fact, a legal one, it is my duty to send a Case for the opinion of a Court of Law, as to the effect of the Devise to *William Berry*.

No Case appears to have been stated for the opinion of a Court of Common Law; for, on the 31st of January 1828, the Cause came on for further Directions, when a Decree was made for a specific performance of the Agreement.

LORD v. SUTCLIFFE.

MARY LORD made her Will, dated the 14th of November 1817, and which was, partly, as follows: " I do hereby give and bequeath unto my Nephew, *Thomas Lord*, 50 s. a month, the term of his natural life, to be paid to him monthly after my decease, in lieu of him giving up all other notes and claims: Also, I give unto my Niece, *Mary Knowles*, the Daughter of my late Niece *Sally Lord*, the Sum of 150*l.* to be paid twelve months after my decease, if she is then living."

The Testatrix afterwards made a Codicil, dated the 16th of August 1821, and which was as follows: " I do give and order that *Mary*, the Daughter of *John Knowles*, have 200*l.* twelve months after my decease, if she is then living: also I give *Sally*, the Daughter of *Thomas Lord*, 200*l.* after her Father's decease: also, to *Thomas Lord* I give and order that he shall have 3*l.* a month, the time of his natural life: also I give, unto the Chapel at *Mill Wood*, 60*l.*; and all other things to be paid and done as the Will hereto directs."

The Bill was filed, by *Thomas Lord*, against the Testatrix's Executor, praying for the usual accounts of the Testatrix's Personal Estate and Effects, and that the Trusts of the Will and Codicil might be carried into execution, and that funds might be set apart to secure the monthly payments of 50 s. and 3*l.* to the Plaintiff. The question in the Cause was, whether the Plaintiff was entitled to both monthly payments, or to the latter of them only.

1828 :
3d May.

Legacy.

A Testatrix by her Will gave to *T. L.* 50 shillings a month during his life, in lieu of his giving up all other notes and claims, and, by a Codicil, she gave him 3*l.* a month during his Life, and concluded by directing that all other things should be paid and done as directed by her Will: Held that *T. L.* was entitled to both the Monthly Payments.

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Mr. *Pepys* and Mr. *Duckworth*, for the Plaintiff, relied on *Hurst v. Beach* (a).

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Mr. *Spence*, for the Defendant, said that the peculiar wording of the Codicil varied this Case from *Hurst v. Beach*; and that the Testatrix did not intend that the Plaintiff should have both the monthly payments, but only to increase the 50 s. to 3 l.; and he cited *The Duke of St. Albans v. Beauclerk* (b).

The *Vice-Chancellor* said that this Case came within the Rule laid down by Sir *John Leech*, V. C. in *Hurst v. Beach*, and declared that the Plaintiff was entitled to the several payments of 50 s. and 3 l. during his life.

MORTIMER v. WEST.

17th and 26th
April.

Will.
Construction.

RICHARD MORTIMER, deceased, by his Will, disposed of his Real Estates and the residue of his Personal Estate, in the following words:

Devise to A. B. C. &c. share and share alike, for their Lives, remainder to their respective Children, for their Lives, and so to be continued, from Issue to Issue, for Life. But, if any of them die, leaving no Issue, their Shares to go to the Survivors, for their Lives, and the Issue of such of them as shall be dead, and, for default of any Issue then over. Held, that A. B. C. &c. take Estates-tail, with Cross-remainders.

Legacy.—Testator, by his Will, gave an Annuity payable out of his Freehold, Copyhold, and Personal Estate, and, by a Codicil, not duly attested, revoked the Annuity. Held, that it was a subsisting Charge upon the Freeholds.

(a) 5 Madd. 351. (b) 2 Atk. 636.

ments, with the Appurtenances, situate at the half-way Houses, *Hampstead Road*, at *Kentish Town*, at *Holloway*, at *Bethnal Green* or *Hackney*, at *Shoreditch* and *White-chapel*, in the County of *Middlesex*, and City of *London*, and elsewhere, and all other my Estate and Effects, Real and Personal, not hereinbefore disposed of, where-soever the same may be, and of whatsoever the same may consist, which at the time of my decease I may be possessed of, entitled to or interested in, to hold such of my said Estates as are Real Estates of Inheritance, to the said *William West*, *John Scales*, *Richard Laycock*, and *William White*, and the survivors and survivor of them, their and his Assigns for ever, without impeachment of waste, and to hold such of my Estates as are Leasehold, for the remainder of the several terms to come therein, upon the Trusts, nevertheless, and to and for the intents and purposes, and subject to the provisos and declarations following, that is to say, upon Trust, to sell, by public Auction, all my Stock, Implements, and Materials of all kinds, and all other Goods and Moveables not hereinbefore given and disposed of, and all such of my Personal Estate as does not consist of Messuages, Lands, Monies or Annuities, or Securities for Money, and to collect and get in such Debts and Monies as may be owing to me at my decease; and, after my decease, to place the amount or produce thereof out at Interest on Mortgage Security, upon Land in the County of *Middlesex*; and to let and receive the Rents and Profits of my said Messuages, Lands, Tenements and Hereditaments, as the same shall become due and payable, quarterly, and by and with the said Rents and Profits, Interest Monies, Annuities, and all and every Sum and Sums of Money that may be accruing and payable, in the first place, to discharge

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my just Debts, Funeral and Testamentary Expenses, Legacies above given, and all payments charged on my said Estates, or any of them; and, in the next place, to pay to my Wife *Mary*, one Annuity or yearly Sum of 150*l.* for the term of her natural life; and also to pay, to *Martha Davies*, one Annuity or yearly payment of 100*l.* during the term of her natural life; and upon further Trust, as to the residue of the net Proceeds of the said Rents and Profits, Interest and other Monies, (after discharging all necessary outgoings), and as to the whole of the same Rents, Profits, and Monies, after the several deceases of my said Wife *Mary*, and *Martha Davies*, to pay and divide the same, by quarterly payments as aforesaid, to and amongst *Ann*, the Daughter of the said *Martha Davies*, *Richard*, the Son of the said *Martha Davies*, *John Treasure*, the Son of the said *Martha Davies*, *James*, Son of the said *Martha Davies*, or such of them as shall be living at my decease, together with every Child born of the Body of the said *Martha Davies*, and living at my decease, or born and living within nine Calendar Months afterwards, Share and Share alike, for their several lives; and, from and after the decease of every of the said Children of the said *Martha Davies*, whether before or after attaining the Age of Twenty-one years, leaving Issue, the Share of such Child so dying to go and be divided equally between his or her Children, whether Sons or Daughters, for life, Share and Share alike, if more than one, and, if but one, then the whole Share to such only Child, for life, and so to be continued and distributed, in a descending line, *per stirpes*, from Issue to Issue, for life, so long as any issue shall be living descending from the said *Martha Davies*, the Children of the Parent dying to take such Parent's Share, equally

between them, in all cases of decease. But my Will is, and I do direct that, in case any of the said Children of the said *Martha Davies*, or their respective Issue, shall die leaving no Issue, then the Share of him or her so dying shall go and be divided amongst his or her surviving Brothers and Sisters, equally, for their lives, and proportionably amongst the Issue of such Brothers and Sisters as shall be dead (if any), according to the share the Parent would have had if alive, and for default of such Brother or Sister, or their Issue, then to fall into the gross produce of the Rents and Profits for the benefit of all those entitled to the distribution thereof as aforesaid. And I also direct that no Child's Share (except as after mentioned), shall be payable till the age of Twenty-one years ; but, in the mean time a proportionate part, if the whole shall be too large, at the discretion of my Trustees, shall be applied for their education, maintenance, and putting out in the world, when they shall become of a proper age, and the residue of their Share to accumulate from time to time, at Interest, and be paid them at the age of Twenty-one years, except in the Case of females marrying before the age of Twenty-one years, in which case such female's Share shall be payable to them only, and their sole receipt be a discharge, exclusive of and not subject to any Husband's Debts, Engagements, Control or Intermeddling ; nor shall the Share of the said Rents and Profits and Monies, nor any Child's Interest therein, be assignable, saleable, or, in anywise, transferable to any other person, nor any authority given for receipt of the same in case of residence at a distance, but what may be at any time revoked ; and, for default of any such Issue descending and proceeding from the said Children of the said *Martha Davies* as

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aforesaid, then, whenever such an event shall happen, upon trust, to sell and dispose of, in suitable lots, all my Freehold, Copyhold and Leasehold Estates, and all my Lands, Messuages and Hereditaments whatsoever and wheresoever, for the most Money that can be reasonably gotten, and the Purchase-money arising from the Lands and Tenements in every separate Parish, to be placed out, separately, at Interest, in the names of the Trustees or Trustee for the time being, on some good Mortgage Security in *Middlesex*, and the Interest arising therefrom to be made payable quarterly, and to be divided and paid by quarterly payments, amongst such and so many poor decayed housekeepers, or such as have been housekeepers, and then resident within the said Parish, as my Trustees may approve of and elect."

The Testator, by a Codicil not duly attested to affect Freehold Estates, revoked the Annuity given by the Will to *Martha Davies*.

The Testator survived his Wife, and died on the 9th of March 1809. At his decease *Martha Davies* (who was a single woman), had six Children; namely, *Richard Mortimer*, *James Mortimer*, *Thomas Mortimer*, *Jeremiah Mortimer*, *John Treasure Mortimer*, and *Ann*, who was afterwards the Wife of *Richard Ford*. All these Children, except *Thomas* and *Jeremiah*, were born before the date of the Will. *John Treasure Mortimer* afterwards died an infant, intestate, and without Issue.

The Bill was filed, in November 1817, by the four surviving Sons, (all of whom, except *Richard*, were

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infants) against the Trustees and Executors of the Will, and Mr. and Mrs. *Ford* and their infant Children. It charged that, upon a true construction of the Will, all the clear residue of the Testator's Real and Personal Estates was given to the Defendants, the Trustees and Executors, in trust, subject to certain charges, for the benefit of the Plaintiffs and the Defendant *Ann Ford*, as the five surviving Children of *Martha Davies*, absolutely, and for their sole and entire use and benefit; but that the Defendants, the Trustees and Executors alleged that the Plaintiffs and Defendant *Ann Ford* were only entitled to an Estate and Interest for their respective Lives, in the Real and Personal Estates of the Testator, or in parts thereof, and that they were then given over to charitable purposes. Whereas the Plaintiffs charged that, upon the true construction of the Will, the whole of the Real and Personal Estates were given to the Plaintiffs and Defendant *Ann Ford*, absolutely, but that, if not, then Estates for Life in the said Property, were, by the Will given to the Plaintiffs and the Defendant *Ann Ford*, in equal Shares, with remainders, in such Shares, to their Children, as Tenants in tail, or as *quasi* Tenants in tail thereof.

The Bill prayed that the Will might be established: That the usual accounts might be taken of the Testator's Real and Personal Estates: That the rights of all parties under the Will might be declared; and that the Residue of the Testator's Personal Estate might be ascertained, and properly secured for the benefit of all persons interested therein.

Pending the Suit, *Richard Mortimer* the younger, assigned, his Share in the Testator's Real and Personal

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Estates, to one *Morgan*, to secure 630*l.* and Interest ; and afterwards, by his Will, dated the 23d of November 1818, (which was attested by two witnesses only) gave all his interest in those Estates to *Martha Davies*, *Richard Dent*, and *Thomas Blyth*, and appointed them his Executrix and Executors. On the 15th of August 1819, *Richard Mortimer*, the younger, died without Issue, upon which a Bill of Revivor and Supplement was filed, stating these facts.

The *Master*, in pursuance of a reference made to him by the Decree on the hearing of the Cause, reported that the Testator left no Heir at Law or Customary Heir.

On the 3d of April 1827, the Cause came on to be heard before The Lord Chancellor, for further directions, when His Lordship ordered the Cause to stand over, and that, in the mean time, the Bill should be amended by striking out the names of the Plaintiffs, *Thomas* and *Jeremiah Mortimer*, and making them Defendants. The Bill was amended accordingly ; and, on the Cause being heard for further directions, The Lord Chancellor decided that those two Children, being Illegitimate, and born after the date of the Will, took nothing under it.

The Cause now came on to be heard, a second time, for further directions.

Mr. *Sugden*, Mr. *Bickersteth*, Mr. *J. Martin*, and Mr. *Stuart*, for the Plaintiffs and the Defendants Mr. and Mrs. *Ford*, said that the Will first gave to the Children of *Martha Davies* express Estates for their

Lives; but that the subsequent words enlarged those Estates into Estates-tail.

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Mr. *W. Brougham*, for the Crown, contended, that the Children took Life-estates only, and that the limitations to their Issue were void. He cited *Seaward v. Willock (a)*.

Mr. *Pepys*, for the Defendants, the Children of Mrs. *Ford*, who were all born after the Testator's decease, said that, according to the principle of the Decree in *Humberston v. Humberston (b)*, Mrs. *Ford* took an Estate for Life under the Will, with Remainder to her Children in tail.

Mr. *Blackburn*, for *Martha Davies*, contended that the Annuity given to her by the Will, was a subsisting Charge upon the Freehold Estates; because the Codicil by which the Annuity was revoked, was not duly attested. *Buckeridge v. Ingram (c)*, and *Sheddon v. Goodrich (d)*.

Mr. *Horne*, Mr. *Garratt*, and Mr. *Tinney*, appeared for the Trustees, and other Parties.

Mr. *Bickersteth* in reply :—

It has been said that *Humberston v. Humberston* governs this Case. But this is not a Case of Executory Trust, as *Humberston v. Humberston* was. The devise in *Jesson v. Wright (e)* closely resembles the present one. It is clear therefore, that Estates-tail vested in the Children of *Martha Davies*.

(a) 5 East, 198. (b) 1 P. W. 332. (c) 2 Ves. 652.

(d) 8 Ves. 481. (e) 2 Bligh, 1.

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Mr. Peppys:—There were no second Life-estates in *Jesson v. Wright*.

The VICE-CHANCELLOR:—

In consequence of the *Lord Chancellor's* declaration, I am to consider this Will as if the provision intended to be made by it, for the Children of *Martha Davies*, who might be born after the date of the Will, was not inserted.

In this Will there is an evident and expressed intention that all the Children who take in the first instance, and their Children, should take Estates for Life. Now, in *Seaward v. Willock*, the Court was compelled to say that, as there was a single intent to create a succession of Life Estates, which was not warranted by Law, *Thomas Southcomb* took an Estate for Life only in the Property devised to him and his Descendants. But here, besides the intention to give Life Estates, there is an intention that the Estates shall not go over until there is a general failure of Issue. That circumstance, according to the Judgment of Lord *Ellenborough*, C. J., in *Seaward v. Willock*, and the decision in *Jesson v. Wright*, compels me to hold that the persons who are to take under this Will, take Estates-tail in the Freeholds and Copyholds. And it appears to me, on looking at the Will, that there are Cross-Remainders; and therefore, *James Mortimer* and *Ann Ford* take, each, a Moiety of the Real Estates.

The case of *Humberston v. Humberston* is not applicable to the present Case: for there the Trust was Executory: and, in those cases, the Courts adopt the doctrine of *cy pres*. That mode of construction is

inapplicable where, as in this case, the Devises take by direct Devise to themselves.

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Then with respect to the Annuity given to *Martha Davies*. The Will contains a direct Devise to her of an Annuity out of Freehold, Copyhold, Leasehold, and Personal Estates. But the Testator, by an Instrument attested by one Witness only, has revoked that Devise; and, therefore, according to the Decisions in the Cases that have been cited in support of her Claim, I hold that, as to the Copyhold, Leasehold, and Personal Estates, her Annuity cannot exist; but that, as far as the Freehold Estates are concerned, it is a subsisting Charge.

A question has occurred to me which was not argued, namely, what Estates the Children of *Martha Davies* take in the Leaseholds?

It might be contended, according to *Forth v. Chapman* (f), that the gift over on dying without Issue, might be confined to dying without Issue living at the decease of the Devises; so that, as in *Forth v. Chapman*, there would be an Executory Devise as to the Leaseholds, and an Estate-tail as to the Freeholds. I think, therefore, that I had better suspend saying any thing as to the Leaseholds.

The Counsel declined to argue the point suggested by The *Vice-Chancellor*; upon which His Honor decided that *James Mortimer* and *Ann Ford*, and the Representatives of *Richard Mortimer*, took the Leaseholds and Personal Estate equally.

(f) 1 P. W. 663.

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“ Declare the Will well proved, &c. and that, upon the death of the Testator, the late Plaintiff *Richard Mortimer*, the younger, together with the Plaintiff, *James Mortimer*, and the Defendant, *Ann Ford*, and *J. Treasure Mortimer*, deceased, became and were entitled to the Testator's Freehold and Copyhold Estates, as Tenants in Common in Tail-general, subject, as to the said Freehold Estates, to the Annuity of 100*l.* to the said Defendant *Martha Davies*; and that, upon the death of the said *J. T. Mortimer*, without Issue, the said *R. Mortimer*, the younger, the Plaintiff *James Mortimer*, and the Defendant *Ann Ford*, became and were entitled to the said Freehold and Copyhold Estates, as Tenants in Common in Tail-general, subject, as to the said Freehold Estates, to the said Annuity; and that, upon the death of the said *Richard Mortimer*, the younger, without lawful Issue, the Plaintiff, *James Mortimer*, and the Defendant *Ann Ford* became, and then were entitled, to the said Freehold and Copyhold Estates, as Tenants in Common in Tail-general, with Cross-remainders, subject, as to the said Freehold Estates, to the said Annuity. And declare, as to the Leasehold and other Personal Estate of which the Testator was possessed at his death, that the said *Richard Mortimer* the younger, *John Treasure Mortimer*, the Plaintiff *James Mortimer*, and the Defendant *Ann Ford*, became, on the death of the Testator, entitled thereto, absolutely, as Tenants in Common; and that, in the event of the said *J. T. Mortimer* dying under twenty-one years, and without lawful Issue, his Share survived to the said *R. Mortimer* the younger, the Plaintiff, *James Mortimer*, and the Defendant, *Ann Ford*, absolutely, as Tenants in Common, and that the Plaintiff *James Mortimer* is now entitled, absolutely, to one third part of the said Leasehold and other Personal

Estate; and that the said Defendant *Ann Ford* is now entitled to another one-third part thereof; and that the said Defendants, *Martha Davies, &c.*, as the legal Personal Representatives of the said *Richard Mortimer the younger*, are entitled to the remaining one-third part thereof, &c.”

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MACARTNEY v. GRAHAM.

A BILL of Exchange for 256*l.* 18*s.*, was, on the 22d of November 1824, drawn upon the Defendants, Messrs. *T. and W. Graham*, of *Bath*, by *M'Laren and Denby*, payable, two months after date, to themselves or order. The Bill was accepted by Messrs. *Graham*, and made payable by them, at the Banking-house of *Barnard, Dimsdales, & Co.* in *London*, and was afterwards indorsed by *M'Laren, and Denby*, and by *James and William M'Laren & Co.*, and by *William M'Laren*. On the 16th of December 1824, the Bill was discounted, for *William M'Laren*, by one *Scott*, who was the Agent, at *Crieff*, for The Commercial Bank of *Scotland*, and, thereupon, *Scott* specially indorsed the Bill to the Plaintiff, the Manager of that Bank, in *Edinburgh*. On the 18th of December 1824, the Bill was stolen from the Mail-coach, on its way from *Crieff* to *Edinburgh*. The Commercial Bank informed the Messrs. *Graham* of this occurrence, and requested them to pay the amount of the Bill, and, at the same time, tendered them a Bond of Indemnity against all future demands in respect of it.

7th May.

Equity.
Lost Bill of
Exchange.
Parties.

A Bill will lie by the last Indorsee of a lost Bill of Exchange to recover the Amount from the Acceptor: and prior Indorsees need not be made parties to the Suit.

The Messrs. *Graham* having refused to pay the Money due on the Bill of Exchange, the Bill in this

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Cause was filed against them only, to enforce the payment, and contained an offer, on the part of the Plaintiff, to deliver to them the Bond of Indemnity on the amount being paid.

The Defendants put in a general Demurrer, for want of Equity.

Mr. *Pemberton*, for the Defendants, in support of the Demurrer :—

The Equity of this Case has been decided, by Sir *W. Grant*, M. R., in *Mossop v. Eadon* (*a*). It has, however, been lately determined, in the Court of King's Bench, that the Indorsee of a Bill of Exchange, who had lost it, could not recover the amount, at Law, from the Acceptor (*b*). The ground of that decision was that the Holder of the Bill might bring actions against the other Parties liable upon it. But, here, the Bill was indorsed, specially, to the Plaintiff, and no Person, except the Plaintiff, can make any claim upon it. Therefore, there is not, in this Case, the ground which was the foundation of the decision in the Case referred to.

Next, when a Party comes for relief to a Court of Equity, he must bring, all the Parties interested in the matter in dispute, before the Court. All the Indorsees ought, therefore, to have been Parties to this Bill.

Mr. *Sugden*, and Mr. *Koe*, for the Plaintiff, in support of the Bill :—

The Case upon which Sir *William Grant* decided

(*a*) 16 Ves. 430.

(*b*) *Hansard v. Robinson*, 7 Barn. & Cress. 90.

Mossop v. Eadon, has been overruled by *Hansard v. Robinson*. The first Indorsement on this Bill was a general Indorsement.

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As to the objection for want of Parties : against whom had the Plaintiff a right to recover on this Bill of Exchange, except the Party from whom he seeks payment. He is the person to whom the Plaintiff ought to deliver the Bill.

Mr. *Pemberton*, in reply :—

Each of the Indorsees is liable on this Bill of Exchange, unless it is paid by the Acceptor. The Plaintiff may file a similar Bill against each of those individuals. Therefore, they are all interested in seeing that the Bill of Exchange is paid, and ought to be included in the indemnity. The Bill of Exchange, if it had not been lost, would, on its being paid, have been delivered to the Acceptor, and each of the Parties would be discharged from his liability : but, when the Bill remains outstanding, the liability of each party remains.

The VICE-CHANCELLOR:—

I do not see the force of the objection for want of Parties. The Acceptor is primarily liable : and he, by paying the Bill, discharges the other Parties from all liability.

The Case of *Mossop v. Eadon*, has been over-ruled by the decision in *Hansard v. Robinson*.

Demurrer Over-ruled.

CASES IN CHANCERY

BEFORE THE

VICE-CHANCELLOR.

BLAIN v. AGAR.

A DEMURRER to the original Bill in this Cause having been allowed (a), the Bill was amended. The amendments consisted in striking out the Name of one of the Plaintiffs, naming three other Shareholders as Plaintiffs, omitting all mention of the Indenture stated in the former Report, and introducing an allegation that the Plaintiffs were ignorant of the Names of all the Shareholders, except those who were Parties to the Suit. The Plaintiffs in the amended Bill, held the same number of Shares as the Plaintiffs in the original Bill, some of which they had acquired by paying Deposits to the Company, and the remainder, by Transfers made to them by other Shareholders. The Prayer of the original Bill remained unaltered.

The Defendants put in a general Demurrer for want of Equity; and also demurred, *ore tenus*, for want of Parties.

all the other Shareholders parties, if they are ignorant of their names.

(a) See 1 vol. 37.

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Y

1828.
7th and 14th
May.

*Joint-stock
Company.
Fraud. Parties.*

The holders of Shares in a Joint-stock Company, purchased immediately from the Company, are entitled to relief, in Equity, against the fraudulent conduct of the Directors.

Some of the Shareholders in a Joint-stock Company may file a Bill to have their Deposits repaid without making

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Mr. *Sugden*, in support of the Demurrer:—

This Company is a Partnership; and a Bill cannot be filed, by some of the Partners, to get out of a Partnership, without bringing all the Parties interested before the Court (*b*). The Bill cannot be sustained, because it is not filed by the Plaintiffs on behalf of themselves and others having the same interest.

The second objection is, that the remedy is at Law. The Plaintiffs do not require any Accounts to be taken, but only that they may be repaid their Deposits. There is only one Case that comes near this, and that is *Colt v. Woollaston* (*c*). That Case involved the Trust of a Real Estate, which gave this Court jurisdiction. The Bill alleges that Mines have been taken and worked; and, therefore, this Scheme cannot be said to be a Bubble. If a Person wishing to sell a Public House misrepresents the custom of it, did any one ever know of a Bill being filed, in this Court, to be relieved against the misrepresentation?

A great many of the Directors are not before the Court (*d*); and the nature of the office is, not to make subsequent Directors answerable for the dealings and transactions of their Predecessors; and, therefore, if the latter have acted unfairly, the former are not responsible for their conduct.

The Bill states that many of the Scrip-Receipts were

(*b*) See *Long v. Yonge*, post.

(*c*) 2 P. W. 154.

(*d*) Both the original and amended Bills alleged that such of the Directors, named in the Prospectus, as were not made Defendants, had never acted, or in any manner interfered with the affairs of the Company.

sold and delivered over, by the persons holding the same, to other persons ; by which means the Plaintiffs became placed in, and vested with the situation and rights of the Sellers ; and that some of the Purchasers, afterwards, made re-sales and transfers to others ; and that the Plaintiffs were original applicants for Shares, and paid Deposits to the Bankers of the Company ; and that, by such means, the Plaintiffs became, and are holders of 1,690 Shares, and entitled to all right, benefit, and interest to, of, in, and from the Deposits and Sums paid, as aforesaid, upon and in respect of the same Shares respectively, and the holders of the Scrip-Receipts delivered in respect of such Shares respectively. This statement amounts to this : that, though the Plaintiffs are original holders of Shares, they are also holders of Shares which they purchased from others ; and, therefore, they ought to have brought before the Court the original Purchasers of the Shares of which they are Assignees. Besides, the sale of Scrip is within the Bubble Act (e). The Transferees of the Scrip-Receipts could maintain no Action, against the Directors, to recover the Money which they paid to the original holders. The Directors are not stated to have any control over the Funds of the Company, nor have they any power to let the Plaintiffs out of the Concern. The Plaintiffs assume to represent all the Parties interested, and yet the Bill is filed by themselves alone.

The Bill does not pretend that the Money is still in the hands of the Bankers, but expressly alleges that it has been spent in prosecution of the Scheme ; the

(e) 6 G. 1, c. 18.—Sect. 18, 19, & 20 of this Act were repealed by 6 Geo. 4, c. 91.

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Plaintiffs, therefore, are too late to apply to have their Money returned.

The Bill states that, in November 1825, Mines had been worked. This puts the Plaintiffs out of Court; for it shows that the Scheme was not a mere Bubble.

If the relief prayed were granted, the Plaintiffs would continue Partners as to the public, and also as to the rest of the Proprietors, for their liabilities to both would remain.

The Parties are wanting, without whom the Plaintiffs cannot obtain the only relief that they are entitled to, namely, to have the Partnership dissolved.

Mr. Theobald, with Mr. Sugden, cited *Beaumont v. Meredith* (f), *Farmer v. Russell* (g), *Josephs v. Pebrer* (h), and *Mitf. Treat.* 129, and said that it was impossible to read the Bill without seeing that the Plaintiffs treated the Company as a Partnership; that, if it was not a Partnership, and the Plaintiffs were entitled to a return of their Deposits, each of them ought to have sued separately, and that it had been so decided in *Jones v. Garcia Del Rio* (i); that, though the Plaintiffs might, in respect of the Shares of which they were the original holders, be entitled to have their Deposits returned on account of the misconduct of the Directors, yet it did not follow that they had the same right, in respect of the Shares of which they were Transferees: that the Plaintiffs might each have a different Equity: that, by some of them, the fraud might have been waived: that

(f) 3 V. & B. 180.

(g) 1 Bos. & Pull. 296.

(h) 3 B. & C. 639.

(i) 1 Turn. & Russ. 297.

the Association was illegal, as the Shares might be transferred *in infinitum*; and that therefore the Court would remain neuter between the Parties.

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Mr. Knight, in support of the Bill:—

This Bill is not distinguishable from the former one, except by the absence of the Deed, upon which the objection to that Bill that prevailed was founded. In *Colt v. Woollaston*, the Plaintiffs were two unconnected Shareholders: therefore the form of the Record is right. Any number of Individuals may join together, to recover the Deposits which have been obtained from them by Fraud.

I deny that this is the Case of a Partnership. The foundation of the Plaintiffs' Case is this, that the Defendants have cheated them out of their Money, by false representations of a Partnership which never has been, and never can be constituted. In such a case, one Plaintiff cannot file a Bill on behalf of himself and others; for *non constat* that they may all wish to withdraw their Money. If there has been a trading, the act was not authorized.

Next, as to the objection that the Scheme is illegal. Has there ever been a Statute passed, which fixes a limit to the number of Parties in a Concern? There is no pretence, here, to act as a Body Corporate, or to raise transferable Shares. A mere right is transferred of going in and executing a Deed which is afterwards to form a Partnership. Is there any thing illegal in that? *Nockells v. Crosby* (i).

(k) 3 B. & C. 814.

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All that I have to show, is that this Case is within the principle of *Colt v. Woollaston*, which was a Case of Equitable Assumpsit, where relief was given against a Fraud. If the Plaintiffs have been cheated of their Money, according to the statements of the Bill, which are admitted by the Demurrer, the principle of that Case applies to the present one. It is stated that, before any thing near 500,000 *l.* had been paid, or even subscribed for, the Directors, without the privity of the Plaintiffs, set to work, and began to take Mines, although the Plaintiffs paid their Money on the faith that nothing would be done until the whole Capital was raised, and the Deed of Settlement was executed. The Plaintiffs might have advanced their Money to make part of a Capital of 500,000 *l.*, though not to make part of a Capital of 100,000 *l.* The Defendants, too, reserved no fewer than 3,800 of the Shares, intending to make Profit of them; but they now refuse to take those Shares. A great many of the Persons named as Directors, never had any thing to do with the Concern.

Although the new Directors may not have been Parties to the Fraud, yet, if a certain number of Persons have cheated an Individual of his Money, and transferred it into the names of themselves and others, that Individual has a right to sue all the Transferees.

Mr. Sugden, in Reply:—

This is not a Case in which the Directors have put one shilling into their own pockets. The statements in the Bill show that the Partnership has commenced; and no one can withdraw from the Partnership without performing all the obligations to which he has become

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liable. No answer has been given to the argument that these Plaintiffs do not seek to get rid of the Partnership. Either the Plaintiffs must apply to the Court as representing themselves and others, or each must come, singly, for his own demand. If an Estate is sold in Lots, and it is sought to set aside the Sale on the ground that there were no real Bidders at the Sale, every one of the Purchasers must file a separate Bill.

The time at which each of the Plaintiffs became a Partner, may give him an entirely different Equity from that of the other Co-plaintiffs. Each may have a different Case. It is not pretended that these Plaintiffs all bought their Shares at the same time. *Jones v. Garcia Del Rio*. In *Colt v. Woollaston*, two Persons were allowed to join as Co-plaintiffs: but an Answer, and not a Demurrer, was put in; and therefore the objection was not taken. Besides, the two Parties there stood in precisely the same situation. The Estate was vested in a Trustee; they, therefore, were *cestui que trusts*, and had a right to join in the Bill.

The VICE-CHANCELLOR:—

This Bill states a Case of Fraud, in respect of which a Court of Law will relieve; and it is no reason to prevent that relief being obtained in a Court of Equity, because it may be had at Law; for, in Cases of Fraud, Courts of Equity have concurrent jurisdiction with Courts of Law. In *Colt v. Woollaston*, the Master of the Rolls says: "It is no objection that the Parties have their remedy at Law, and may bring an Action for Monies had and received for the Plaintiffs' own use; for, in Cases of Fraud, the Court of Equity has concurrent jurisdiction with the Common Law: matter of Fraud being the great subject of relief here." And it

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does not appear that the judgment of the Master of the Rolls was founded upon the circumstance that the Suit concerned Land.

From the statements in the Bill that have been referred to by the Defendants' Counsel, it is plain that the Plaintiffs do mean to claim, as being immediate Purchasers, and as Purchasers from prior Purchasers; and, as far as they sue in the latter character, it is impossible to maintain the Bill: but, as original Purchasers, they do not stand exposed to any such objection.

This, then, being a Case in which the Plaintiffs are entitled to some relief in a Court of Equity, the Demurrer for want of Equity, must be over-ruled.

Next, with respect to the objection for want of Parties. If there were not the allegation, in the Bill, that the Plaintiffs do not know the names of the other Subscribers, there would be no substantial difference, as far as this objection is concerned, between the Record as it now stands, and as it was originally shaped. But, as the present Bill contains that additional allegation, I am of opinion that the Demurrer, for want of Parties, is not sustainable⁽¹⁾.

(1) In *The King of Spain v. Hullett*, which lately came before The Lord Chancellor, some persons who were merely Agents, in this country, for the Spanish Government, were joined, with the King of Spain, as Plaintiffs in a Bill for an account of Monies, belonging to that Government, in the hands of the Defendants. The Defendants demurred, generally, to the Bill, on the ground that the Agents, having no interest in the subject-matter of the Suit, ought not to have been made Co-plaintiffs with the King of Spain; and The Lord Chancellor allowed the Demurrer.

TOWNLEY v. COLEGATE.

THE Plaintiff was Vicar of the Parish of *Orpington*, with *St. Mary Cray* annexed, in the County of *Kent*. The Bill alleged that the Defendant, *Margaret Colegate*, had, ever since the Plaintiff's induction, occupied a Water Corn-mill in the Parish of *Orpington*, at which she had ground large quantities of Corn, Grain and Malt belonging to other persons, and had made great profit by the Toll paid for the grinding of it; and that she had also ground, at her Mill, other large quantities of Corn, Grain and Malt belonging to herself, and had sold the Meal so ground, and made great profit thereof. The Bill contained similar allegations as to the Water Corn-mill occupied by the other Defendant, *Snelling*, in *St. Mary Cray*. It prayed for an account of the Tithe of the Profits made by the Defendants of their respective Mills.

The Defendant *Colegate*, by her Answer, said that she believed the Corn-mill in her occupation, was an ancient Mill, and was built on the foundation or site of an ancient Mill, and which was built and existed before or beyond living memory: that she had never paid any Tithes, and that she believed no Tithes had ever been paid for such Mill, but that it had always been considered exempt from Tithes: she admitted that she had ground Corn, Grain and Malt, as well belonging to herself as to other persons, and had made profit by the Toll paid for grinding the former, and had sold and made profit of the Meal arising from the latter; but

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5th and 22d
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Pleading.
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Defendant, in her Answer to a Bill for Tithes of a Mill, said that it was an ancient Mill, built before living memory; that no Tithes had ever been paid for it; and that it had always been considered exempt from Tithes. Held that the exemption was well pleaded.

A Miller who grinds his own Corn, and sells the Flour, is not liable to Tithes for his Mill.

A Terrier is evidence as to personal Tithes.

Issue directed, on the application of a Vicar, to try the right to Tithes.

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insisted that, for the reasons and under the circumstances before stated, her Mill was not liable to pay Tithes; and added that she believed that, from time whereof the memory of man was not to the contrary, it had been free from Tithes.

Snelling's Answer was to the same effect, except that he said that his Mill was an ancient Mill, and was built and existed before or beyond living memory, and denied having ground at it any Malt at all, or any Corn or Grain belonging to any person but himself.

The only evidence produced on the part of the Plaintiff was a Terrier, dated in 1764, and containing the following passage: "Mills of *Orpington*, six-and-thirty Shillings; *St. Mary Cray*, Forty Shillings; by custom yearly, to our Vicar, at quarterly equal Payments, due from each to be paid."

The Defendants examined several old inhabitants of the Parishes, who deposed that they believed the Mills to have existed beyond the time of living memory; and that they never knew or heard of any Tithe having been paid for them: and one of these Witnesses said that the general reputation in *Orpington* was that Mrs. *Colegate's* Mill was not liable to the payment of Tithes. The Defendants also produced an extract from Doomsday-book, in which it was stated that there were three Mills in *Orpington*, of 16s. 4d.; and also a Grant from H. 8. of the Manor of *Orpington*, in which Mills were mentioned, generally; and also a Conveyance to the Father of the Defendant, *Snelling*, which comprised a Mill in *St. Mary Cray*.

The first question that arose in the argument in this

Case was, whether the Exemption from Tithes was well pleaded in the Answers.

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Mr. *Pemberton*, and Mr. *Stuart*, for the Plaintiff:—

It is impossible to support an exemption laid as it is in this Case. If a Mill is stated to be an ancient Mill, or to have been built on the site of an ancient Mill, the Court will understand it as capable of being exempt from Tithes. But, if it is alleged to have been built beyond the time of living memory, the Defendant then explains what he means by an ancient Mill, namely, that it was built at an earlier period than any one can remember. It is consistent with the defence here made, that the Mills might have been built after 9 Ed. 2, and yet have never paid Tithes. The question is, do these Defendants allege, with sufficient certainty, that the Mills were built at such a time as to be capable of being exempt from Tithes? If they were built after that time, though they have never paid Tithes down to the present hour, they are not exempt from Tithes.

Mr. *Sugden*, and Mr. *Barber*, for the Defendants.—

The Answers state that these Water Corn-mills are ancient Mills, built before living memory: that no Tithe was ever paid for them: and that they have always been considered exempt from Tithes. In *Browne v. Woollsey* (a), which was decided by the Court of Exchequer, on the 7th February 1826, one of the Defendants alleged that the Mill in his occupation had been erected for upwards of fifty years; that it stood, as he had been informed, upon ground upon which another Mill formerly stood; that he had been informed and believed that, from the date of the erection of the said Mill down to the present

(a) See a report of this Case, post 305.

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time, no Tithes had been paid, in respect thereof, or of the Corn or Grain ground thereat ; and he insisted that, under the circumstances, the Mill ought to be presumed an ancient Mill, and exempt from the payment of Tithes. The allegations in the Case now before the Court, are stronger than they were in the Case referred to, and yet the Exemption was held to be well laid in the latter Case.

The VICE-CHANCELLOR :—

If a Bill is filed to establish a Modus, it must lay the Modus precisely. But, if a Modus is pleaded in an Answer, it is sufficient to state it so that the Plaintiff may know what the Defence is. The Defendants here first state that these Mills are ancient Mills, and were built before living memory ; they then allege that no Tithes have ever been paid for their Mills, but that they have always been considered exempt from Tithes ; though it may be questionable whether the first statement is sufficient, yet the other passages remove all doubt upon the subject ; and I, therefore, think that the Exemption is sufficiently laid.

Mr. Pemberton, and Mr. Stuart :—

The parol testimony is as weak as possible. There is but one Witness who speaks as to there being a reputation, in the Parish, that Mrs. Colegate's Mill is exempt from Tithes. But, as to the other Mill, there is not a particle of Evidence upon that point. If the Defendants had proved, by the Books of Tithe-Collectors, that no Tithes had been paid for the Mills, that would have been something ; but they have only examined persons, most of whom are paupers. On the other hand, we have produced a Terrier, which affords evidence, in our

favour, of the greatest importance. The question is, whether Evidence that the Witnesses never heard of Tithes being paid, is sufficient?

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Mr. Sugden, and Mr. Barber, for the Defendants :—

Some of our Witnesses worked in the Mills, and they all swear that the Mills existed before living memory, and appeared to be old Mills in their boyhood. If it is shown that no one remembers the erection of a Mill, and that it has not paid Tithe, it is sufficient ; and it is not necessary to prove that it existed before 9 Ed. 2. We have proved, by the extract from Doomsday-book, and the Grant from Hen. 8, that there were Mills in these Parishes. The Plaintiff has not attempted to prove that there were any other than these Mills in the Parish, or that they were not the Mills mentioned in those Documents. No Tithe was ever demanded for these Mills : this accounts for there being no reputation in the Parishes as to their being exempt from Tithes ; for the right was not likely to be a subject of discussion. The Tithe of Mills is a personal Tithe, and therefore the Terrier is not admissible in Evidence. *Watson's Complete Incumbent* (b) lays it down that where no Personal Tithes have been paid, none are due. It was decided, in *Browne v. Woolley*, that, where the occupier of a Mill is a manufacturer of Flour, no Tithe is payable.

The other authorities cited for the Defendants, were *Hughes v. Billingham* (c), *Newte v. Chamberlain* (d),

(b) See page 580.

(c) 2 Gwill. 644.

(d) Vin. Ab. tit. *Dismes*, M. a. and 1 Bro. P. C. 157.

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Wilson v. Mason (d), Com. Dig. *Dismes*, H. 12.
Ibid. E. 4 (e).

Mr. *Pemberton*, in Reply:—

It has been said that Tithes are not due for a Mill, where the Miller grinds his own Corn and sells it; but Tithe is payable in respect of the profits of the Mill; and, if a Miller grinds his own Corn, and sells the Flour at an advanced price, he makes a profit. *Hughes v. Billinghamurst* is a mere loose note, and it only states that the Bill was dismissed; not a single fact is mentioned. All that is decided by it is, that, if it is proved that a Mill might be an ancient one, and that no Tithe had been paid for it, it affords a presumption that it was an ancient Mill. It has been said that the Tithe of Mills is a Personal Tithe, and, therefore, that the Terrier is not Evidence; but no authority has been produced for this proposition. The Tithe of Mills is not a personal, but a mixed Tithe. The Terrier is signed by the Churchwardens, who represent the Parishioners, as well as by the Vicar. It is, therefore, signed by all necessary parties, and contains an admission, on the part of the Vicar, and of those who represent the Parishioners, that certain Sums were payable for those Mills. Those Sums are of too large amount to be Moduses, supposing that there could be a Modus for a Mill, which there cannot be, because, before 9 Ed. 2, Mills paid no Tithe. The Defendants have possession of every Title-deed relating to this Property, and might have shown from them, that these Mills are ancient ones;

(d) 3 Gwill. 974.

(e) See also *Manby v. Taylor*, 3 Ves. & Bea. 71. *Ansell v. Adman*, 3 Gwill. 982. *Carleton v. Brightwell*, 2 P. W. 463. *Hall v. Machet*, 4 Gwill. 1460, and 1 Gwill. 130, note.

and that no Tithe was ever paid for them. They cannot be the same as those mentioned in Domesday-book ; for, in 1634, there is Evidence that Tithes were paid for them. Next, we have the Grant of Hen. 8, by which the Manors are conveyed, " together with all Mills, &c." These are nothing but general words. The interval between Domesday-book and the year 1751 is not filled up. *Mrs. Colegate* does not produce a single Deed, not even her own Conveyance. Then we come to the parol testimony. Was it ever attempted before to support a case of exemption by such evidence as this ? No testimony is given as to reputation, except by one of the Witnesses, and even he does not say that he ever heard a syllable on the subject from persons now dead. Though, generally speaking, a party cannot be required to prove a negative, yet it might have been proved that no Tithes had been paid for these Mills, by the Evidence of former Occupiers, and by the Books of the Tithe-Collector.

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The *Vice-Chancellor*, after stating the Claim made by the Bill, and the defence set up in the Answer, continued as follows :—

The first question is, whether Tithes are payable in respect of Corn, belonging to the Parties, ground at their own Mills, and afterwards sold to the public. It appears to me that the Case of *Wilson v. Mason*, is an authority that, in respect of Corn so circumstanced, no Tithe is payable. In the late Case of *Browne v. Woollsey*, the point was distinctly brought forward, and twice deliberately considered, once by the Chief Baron alone, and then by him and the three other Barons ; and my opinion is in favour of that decision, and that the Law is right as laid down in that Decree.

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Next, as there has been Corn ground at the Mill occupied by Mrs. *Colegate*, which did not belong to her, it is necessary to consider whether it is made out that that Mill is an ancient one.

Terriers are received in Evidence of Tithes merely Personal ; and I therefore think that the Terrier is admissible in this Case. But the Evidence it affords is not very material, as there is nothing to connect the Mills mentioned in it, with the Mills in question. The Evidence which has been given by the Witnesses, is very strong to show that these are ancient Mills. The same persons also give testimony of a negative kind, that they never heard that any Tithe was paid for the Mills ; and there is no Evidence that any was paid, except the Terrier. Upon the whole, I am of opinion that the Bill must be dismissed, with Costs.

Mr. *Pemberton* asked for an Issue to ascertain the liability of Mrs. *Colegate's* Mill to pay Tithes.

Mr. *Barber* said that the Vicar was not entitled to an Issue, as his was not a Common Law Right.

But the *Vice-Chancellor* granted the Issue (f).

(f) See Com. Dig. Ecclesiastical Persons, C. 14, a.

BROWNE v. WOOLLSEY.

THE Plaintiff was Rector of *South Town*, otherwise *Little Yarmouth*, and *West Town*, thereto annexed, and Vicar of *Garleston*, in *Suffolk*, which Rectory and Vicarage adjoin each other, and have a common Parish Church. The Defendants were occupiers of Corn-mills within the Rectory. The Bill charged that the Defendants had, during the six years prior to the filing of the Bill, ground, at the Mills in their respective occupations, large quantities of Corn and Grain, and sold the same, when so ground, in large quantities, for large Sums of Money, and also done a great deal of work called Bag and Toll-work, by which was meant the grinding the Corn and Grain of other persons, who remunerated the Miller by paying him, either a certain Sum of Money for a certain quantity of the Corn and Grain ground at his Mill, or by allowing him to retain a dish or certain portion of the Corn and Grain so ground; and that the Defendants had also done a great deal of work called Dressing of Flour or Meal, and had employed their Mills to other purposes, and had thereby made large profits, the Tithes whereof were payable to the Plaintiff. The Bill prayed for an account of the Profits, made by the Defendants, in respect of the said Mills in their occupations, and that the Defendants might be decreed to pay, to the Plaintiff, what upon the taking of the account, should be found due to him.

In the
Exchequer.
1826:
7th February.

Tithe of Mills.

A Miller who only grinds his own Corn and sells the Flour, is not liable to Tithes for his Mill.

The Defendants *Woollsey* and *Secker*, by their Answer, said that, being Merchants and Dealers in Corn and Flour, they were in the habit, from time to time, of

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buying large quantities of Grain, and of grinding and selling the same, in its manufactured state, and that they used the Mill belonging to them for the purpose of grinding the Corn so purchased and re-sold in its manufactured state, in the course of their trade; and that, except as after-mentioned, they had never used their Mill for any other purpose; and that, under the circumstances aforesaid, there was not, and, except as after-mentioned, there never had been any Profit arising from the Grist or Mulcture of the Corn or Grain at their Mill, independent of the Profits arising from the said trade: they admitted that their Mill was a modern one, and submitted that it was exempted from Tithes so long as it continued to be employed in the manner and for the purposes before-mentioned: they denied that they had done any bag or toll-work at their Mill, or employed it for any purpose except as before-mentioned; but they admitted that they had, in a few instances, ground a few bushels of Wheat, for the convenience of certain Persons, in consideration of a small Compensation in Money, but that the whole amount of such Compensation had been much less than sufficient to cover the fair annual value and pay the out-goings and expenses of their Mill, and they submitted, therefore, that no Tithes were due in respect thereof: they denied that they had in their possession any Books, &c. which showed the quantities of Corn and Grain ground and worked at their Mill, or the Profits made by them, other than the Books, &c. relating to their trade, which enabled them to ascertain the quantities of Corn and Grain ground and worked at their Mill, but did not show the Profits made by them; for that they were in the habit of buying Corn and Grain for the purpose only of grinding and manufac-

turing the same into Flour; and that the said Books contained entries only of the quantities of Corn and Grain bought, and of Meal and Flour sold by them, and that the Profits made by them in respect of their Mill, were wholly intermixed with the Profits arising from the manufacture of Flour and from the purchase and sale of Corn and Flour, and could not be distinguished: they denied that they had received or retained any Corn or Grain for bag or toll-work; and they submitted that, under the circumstances aforesaid, no Tithes were due or payable in respect of their Mill; but that, if the Court should be of opinion that Tithes were due in respect of the Mill in their occupation, the Plaintiff was entitled to no more than a tenth-part of the clear Profits arising from the grinding of Corn at their Mill, after deducting a fair annual rent for the same, and all such other expenses and allowances, as, in the judgment of the Court, the Defendants were entitled to claim.

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The Answers of the Defendants *Cooper* and *Jenner*, were to the same effect, except that the latter denied having done any bag or toll-work at his Mill.

The Defendant *Waters*, by his Answer, said that the Mill in his occupation had been erected upwards of fifty years, and stood on ground upon which another Mill formerly stood, and that no Tithes had been paid in respect of the Corn ground thereat: and he submitted that his Mill ought to be presumed to be an Ancient Mill, and exempt from the payment of Tithes: he denied that he had, in his possession, any Books, &c. relating to his Mill, or the work done thereat, or the Profit made thereby, other than the Books relating to his Trade, which contained only entries of the Corn and

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Grain bought, and of the quantities of Corn, Grain and Flour sold by him ; but that, in consequence of the Corn bought by him being, in some instances, resold by him before it was ground, and in consequence of Corn of different qualities producing different quantities of Flour, such entries did not show the quantities of Corn and Grain and other things ground and worked at his Mill, or the Profits made by him. In other respects the Answer of this Defendant was to the same effect as that of the Defendant *Jenner*.

Mr. *Pepys* and Mr. *Simpkinson*, for the Plaintiff.

Mr. *Martin*, and Mr. *Turner*, for the Defendants (a).

The LORD CHIEF BARON :—

In this Cause the Plaintiff is the Rector of *South Town*, otherwise *Little Yarmouth*, and Vicar of *Garleston*, in the County of *Suffolk*. These Benefices are united, and have but one Parish Church. The Bill is brought, against the several Defendants, for an Account of the Tithes of Mills in their several occupations. Not any of the Mills are ancient. The Defendant *Waters* says his Mill, though built within fifty years, was built on the site of an old Mill, and is, therefore, an Ancient Mill. There is nothing in the Cause, that I can discover, to warrant and support this assertion, and, therefore they must all be taken to be recent Mills. All the Defendants say that they do not grind for hire, in the usual way ; but that they are Corn and Grain Merchants ; that they buy the Corn and Grain, grind it, and then sell the Flour in its manufactured state ; and they insist that, for this operation, no Tithe is payable.

(a) The Reporter had no note of the arguments. The judgments are taken from the notes of Mr. Gurney, the short-hand writer.

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There has been much controversy at various times, and there have been many Cases respecting the Tithes of Mills, as to their nature and their character, and as to the manner in which they should be tithed. It seems now settled that they are Personal Tithes; but that, in one aspect, and for one purpose they are Predial. They are Personal as to the mode in which the Tithe shall be computed, and as to the time at which it shall be rendered; and they are Predial as to the Person to whom the Tithe is rendered. They belong to the Incumbent of the Parish where the Mill is situated; so far they are Predial. They are payable only at Easter, and the clear gains alone are titheable, after deducting all Expenses; so far they are Personal. The general question here is, whether Tithes should be rendered where a Mill is not, as hitherto it has usually been, by itself, a substantive undertaking, where the sole Profit is derived from the act of grinding, but where it is employed as part of a Trade or Commerce. I am of opinion, and I speak my own sentiments only, that, under these circumstances, no Tithe is to be paid in respect of the employment of this Engine in the Trade. It is quite clear that the Incumbent is not entitled to participate, in any shape, in the profits of a Trade or Manufacture. That is a proposition that cannot be disputed. It is equally clear, on the other side, that, if the Mill is employed in the usual way, and the Miller is paid for the Grist or Mulcture, the Incumbent is entitled to an aliquot part of what he receives, after deducting the Expenses. It has appeared to me that what I have had to consider in this Case, is, under which of these descriptions this Case is to be classed. I think it is under the first. It appears to me to be decisive against Tithes being due, that there is no

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possible medium by which it can be ascertained how much is due, upon the common principles of Tithe. The Occupier buys the Grain, and he sells the Flour. How much profit or how much loss remains to him, upon the whole, is what he only knows. In one transaction there may be some loss, and, in the next, a great gain. On the whole there may be a profit; or there may be, upon the whole, a loss. This arises from the change in the market prices of the Commodity. Suppose that upon one purchase he loses, is any tithe to be paid in that case? Suppose upon the next he derives a double profit; is double Tithe to be paid for it? When he loses, it is clear he receives nothing for grinding; when he gains, who can say how much is to be considered as received for Grist? I beg that it may be always remembered that Tithe, in its nature, is an aliquot part of some increase, or profit received, or part of the thing itself; and a Decree for those Tithes must proceed upon that ground. I must admit that an Occupation Rent might be set on the Mill, and a proportion of that Rent so set might be paid to the Incumbent; but then I say that Tithe is, in its nature, an aliquot part of an actual increase, or actual profit. Now, supposing that there were an Occupation Rent set on a Mill, the party that paid that would be paying an Assessment in lieu of Tithe, not Tithe, not an aliquot part of any increase or or profit obtained for grinding. The Legislature might enact such a substitution for Tithes; but it would be a substitution: and no Court could, in my judgment, decree it as being Tithe, that is, an aliquot part of the profit actually obtained.

I am the less reluctant to adopt this reasoning, because the point appears to me to have been actually

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laid down, by great authority, in one of the Cases which has been cited, the Case of *Wilson v. Mason* (b), of which I shall only say that it appeared there, that the Defendant ground his Corn for the purpose of distillation, and for the purpose of feeding Hogs with the refuse; and, upon the ground which I have stated, in that case the Mill was not held to be titheable; and the principle is stated, by Lord Chief Baron *Parker*, in these words: "Now the profits arising from the distillation, and feeding of Hogs, are so intermixed with the Grist or Mulcture of the Corn, that we do not see by what medium they can be separated, or how we can distinguish the quantum of the Plaintiff's satisfaction for the Grist or Mulcture, from the profits of the Trade, which he ought to have no share of, upon his present demand of Tithe of a Mill." Now that principle is, in my judgment, directly applicable to this Case; and there is too much good sense in it to leave me to doubt whether that could be questioned. There are, in this case, however, some loose phrases from which it might be inferred that, if the Flour or Meal had been sold, and not used, it might have been titheable; but I think the principle I have read from the book, goes the full length of deciding that, where nothing is paid, specifically, for the Grist or Mulcture, nor any profit obtained but what depends, entirely, upon the circumstances, it becomes impossible to make the separation essential to this claim: and I cannot doubt, that, upon the same principle upon which they decided in that Case, that Court, if they had had this Case before them, must have felt themselves compelled, upon examination, to have decided in this. It is said

(b) 3 Gwill. 974.

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that, by making use of his Mill in this way, the Miller deprives the Incumbent of his Tithes : but so it is with every species of Tithe. The Occupier may use his Land in such a way as to give the benefit of it to the owner of the Great Tithes, or the owner of the Small Tithes ; or, if he pleases (of which we have heard, as an anecdote, a remarkable instance) he may let his Land go to waste. He is not bound to produce any Tithes : that prevails in the whole nature of Tithes. He may cultivate that produce which pays a small and insignificant Modus, or that which is titheable : the Tithe Owner must take his chance as to that.

Upon the best consideration I can give this Case, it appears to me impossible to divide these two things except by an act, which is not tithing, but making an Assessment in lieu of tithing. I, therefore, think that this Bill must be dismissed as far as it seeks any Account of this Trade.

But three of the Defendants admit that they have, from time to time, in some small quantities, upon the application of a particular Person, in some few cases, ground some little matters by the Bag, as they call it. That is the common case in which a Mill is held to be titheable ; and, if the Plaintiff deems it advisable to have an Account of that, I do not see upon what principle it can be refused. He may, perhaps, admit that he has been paid for it : however, I should hardly think it worth his pursuing ; in which case I think that the Bill should be dismissed ; but, under the particular circumstances of the Case, my own impression is that it should be without Costs.

Mr. Baron *Graham* :—I have to express my regret at feeling myself obliged to say that I am of a different opinion from the learned Lord Chief Baron ; and, I rather apprehend, from my two learned Brothers. But I own it strikes me in a different way from what it has been suggested by my Lord Chief Baron.

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The circumstances of the Case are extremely plain and clear. There is a Mill that is liable to Tithe, and must have been so from the time of its first erection, which is long since the Stat. of Edward VI.; and the circumstances which create the peculiarity of this Case, on the ground of which this temporary exemption is claimed on the part of the Defendants, are that, instead of grinding, at the Mill, the Corn of other Persons, he purchases the Corn himself, converts it into Meal, and makes his profit, not by the grinding of the Corn merely, but by the selling of the Meal. Now, when I expressed my regret at being of a different opinion from my Lord Chief Baron and my learned Brothers, I felt the difficulty of sustaining my opinion in opposition to theirs; but I feel much greater difficulty from the Case which has been cited by my Lord Chief Baron, and upon which, mainly, his opinion appears to be grounded; for, unless I can point out a very clear and marked distinction between the present Case and that of *Wilson v. Mason*, it would ill become me to oppose the authority of an individual Judge to a Case that has been solemnly decided, and decided, undoubtedly, by very able Judges at that time. But the Case of *Wilson v. Mason*, to my apprehension, is perfectly and essentially different from this. There the subject before the Court was not a Miller. I know that Lord Chief Baron *Parker* says that he had the character both of a Miller

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and a Distiller; but he was, essentially, a Distiller; and that seems to me to mark the difference in the first instance. Then what is the trade of a Distiller? A Mill is erected for no purpose of grinding Corn for the general profit of Man, or for the food of Man; which are, according to my apprehension, the two objects of the grinding where the Tithe is given to the Parson. What are the circumstances of that Case? The Defendants there had erected a Mill for the purpose of grinding Meal, not for the purpose of human Food, but for the purpose of grinding it as one step and one advance in the progress of their Manufacture; not to use it in the shape of Meal or of Food, but for the purpose of Distillation. When this was ground, whether it was Wheat or whether it was Rye or Barley, for the purpose of Distillation, while it was in that state, it was of no use to any Person, nor did they ever intend to make use of it in that state: but it was to be placed in the Still, and to undergo a variety of other processes, and go through experiment after experiment; and they were to derive their ultimate profit, not from the Meal or the Corn, but from the result of the Manufacture. That was a complicated Case in many of the circumstances; and, to be sure, the Court might say, very clearly, that such a Case as that was not within the object of the Statute which gives this particular Tithe of Mills; because the Corn ground in that Mill was not used for human Food, but was merely subservient to the great purpose of the Manufacture, which was that of Distillation; and then the maxim applies, that you will not break into the private concerns of a Man's Trade; you will not oblige him to discover his affairs, in order to know what would be the ultimate Profit from his Manufacture.

But it appears to me that the Case that presents itself before us, is perfectly different; because what Manufacture is there in the present instance ulterior to the grinding? There is none. When the Corn is ground, the Manufacture is perfectly finished; therefore, it appears to me that it is extremely easy to separate and distinguish the Profit made by the Miller, by grinding, in such a case as this: for when it is ground it is fit for Sale. There is nothing ulterior to be done. There is no further use to be made of it in the way of Manufacture.

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There is another circumstance, in the Case of *Wilson v. Mason*, that I wish to mention. It appears that part of the Mash of the Mill was given to the Hogs kept at the Distillery; and, in some instances, Corn was ground for the purpose of feeding the Hogs; but I consider that as all part of the same Trade. That was the general use to which they applied the Corn when it was made into Mash. It is perfectly known that the feeding of Hogs is part of the Trade of a Distiller. They apply the Mash, and, occasionally, grind Corn for the purpose of feeding Hogs. But that was not within the scope and the object of the original intention of tithing Mills. Then I say that, upon the grinding, here, the whole Manufacture ceases; the whole operation is done.

Now we know that, in many Parishes in England, there are great numbers of Mills, the Tithes of which constitute the principal part of the Provision of the Parson of the Parish. Would not then the consequence be, that every Miller would convert himself, immediately, into a Mealman; and how is it possible for the Rector of the Parish to know whether a Miller grinds

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his own Corn, or the Corn of other People. See then how exceedingly easy it would be to avoid the payment of Tithes on those Mills. In no instance, it is probable, would those Mills continue to be titheable; because it would be perfectly easy for the Miller to say, to the great growers of Corn: "Do not sell all your Corn at Market. I will buy your Corn." And, to the buyers, he would say: "Buy your Meal of me: I can sell you Meal cheaper than any body else; because, by being a Mealman, I pay no Tithes at all; and, consequently, exact a less price for my Meal. By being a Mealman, I can, in the improved state of my Manufacture, which is Meal-grinding, use the tenth part, which, if I was not a Mealman, the Vicar or the Rector would be entitled to. I sell the tenths of the grinding, with the Commodity itself, and, by that means, absorb the whole of the Rector's Tithe, and turn it to my whole advantage and profit."

But it is said that there is a difficulty, in this case, in separating the accounts. I will not take up the words of the Learned Judges who gave their opinion in the Case of *Wilson v. Mason*: but, if one were to look at their language, it would appear that they speak of the difficulty of distinguishing the clear profit of the Mill from the ultimate profit which is made, by the different processes of the Manufacture, in the case of a Distillery. But I say I will not dwell upon that; but I cannot conceive the existence of any great difficulty in coming at the clear profit the Man makes, by the Mill, upon the present occasion. It is said that there is a difficulty in ascertaining what are the profits he ultimately gets by converting it into Meal. In the first place, if he finds it is to his advantage to convert it into Meal, it

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is only saleable in the shape of Meal. No Miller sells his Corn as such; but he sells it in the shape of Meal. I do not perceive that there is any kind of difficulty in ascertaining the amount. The Vicar has only to ask the Miller, how many quarters of Wheat he has ground at such a particular time. Then, when that question is answered, he may ask him, what is the price of grinding. Though the Miller pays no price, and grinds for himself, yet he knows perfectly well what the price is. If he will not say what the price is, the Vicar may prove what it amounts to. Then, if there is such a quantity of Corn ground, and it is ascertained what the price of grinding is, that it is for which the Vicar is entitled to demand Tithe. But it is said that, very likely, when he has ground that Flour, he cannot tell whether he has or has not made a profit of his Flour. If that were the case, I see no reason why he should not say: "With respect to what profit I make of it in the course of my Trade, you have no right to ask me." Let him make that objection, when he pleases, with respect to his own discovery; but surely it is perfectly competent for the Vicar, in such a case as that, when he has once fixed what the price of the grinding is, to go on to say: "I know that, during such a time, or during so many months, you sold your Meal at a profit; you sold without complaint, and you sold in circumstances of credit: you made, therefore, a general profit of it; and I fix the particular profit that I am entitled to, arising from the grinding."

Upon these grounds, therefore, I cannot help thinking that this is a Case of very considerable importance in itself, and of very extensive consequences; and a case upon which I conceive myself to be perfectly grounded

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in saying that there is not that kind of difficulty that there is in an ulterior state of Manufacture. The mere conversion of the Corn into Meal, constitutes all that is done; and it appears to me that the accidental circumstance of the person uniting the two characters together of Miller and Mealman, does not exempt him from the payment of the Tithe upon the grinding of Corn. It is quite clear that the Tithe cannot be separated, at the time of the grinding, from the general expense of the Mill. It is quite clear that the operation of the Mill, that is the grinding, being in this particular Parish, the Rector or Vicar, at this instant, would be entitled to the Tithes upon it, if there was not this difficulty opposed to him, as to the impossibility of separating the account of that which he is entitled to. That does not appear to me to be such as supports my Learned Brother's Judgment. Upon these grounds, therefore, I am of opinion that the Bill ought to be sustained, to the extent of this Claim, against the Persons who are, at the same time, Mealmen and Millers.

Mr. *Baron Garrow*, and Mr. *Baron Hullock*, concurred, in opinion, with the *Lord Chief Baron* (c).

(c) An appeal from the decision in this case, has been argued, in the House of Lords, during the present Session; but Judgment has not yet been given. 24th May 1830.

FOOTNER v. FIGES.

MR. BICKERSTETH, on moving for a new Trial of an Issue directed in this Cause, referred to the 47th of the New Orders, which directs every Application for a new Trial to be made to the Judge who directed the Issue; and said that the Trial, in this Case, had been directed, by the Master of the Rolls, when Vice-Chancellor, and that the question was, whether the present Motion ought not to be made before that Judge.

But the *Vice-Chancellor* said that the meaning of the Order was that the Motion should be made before the same Jurisdiction, though the Judge might have been removed.

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10th May.

*New Trial.
Construction of
47th Order.*

A Motion for a new Trial must be made before the same Jurisdiction as directed the former Trial, although the Judge may have resigned.

DALZELL v. WELCH.

GIBSON DALZELL, Esquire, by his Will, dated the 3d of *March* 1755, gave his Shares in certain Insurance and Mining Companies, and the Residue of a Lease, to Trustees, upon Trust to pay the Dividends, Interest and Profits thereof, to his Daughter, *Frances Dalzell*, during her Life, for her separate use; and directed, in case she should leave any Issue living at

1828 :
14th May.

*Will. Construc-
tion. Power.*

A Testator in designating the objects of a Power of Appointment given to his Daughter, used the words

"Issue," and "Child or Children," synonymously. In a subsequent part of his Will, he gave his Son a Power of Appointment over a different part of his Property, and, in pointing out the objects of it, used the words "Issue," simply : The Son had both Children and Grandchildren living at his death : Held that an exercise of the power in favour of the former only, was void.

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her Death, that the said Shares and the Produce of the said Lease should be disposed of, and the Produce thereof paid and applied to and amongst such Child or Children, at such time or times, and in such Shares and Proportions as *Frances Dalzell* should appoint, and, in default of appointment, to and amongst such Issue, if more than one, in equal Shares and Proportions, as Tenants in Common; and, if there should be but one Child, the whole to be paid to such one; and, in case there should be no Issue of *Frances Dalzell* living at the time of her death, or if they should all die before attaining their respective ages of Twenty-one years, he directed that the Shares, and so much of the Term in the Lease as should be then unexpired, should be sold, and the Money arising by such sale be paid to her, or to such Persons as she should appoint; but, in case *Frances Dalzell* should die Intestate, and without Issue of her body living at the time of her death, then that his Trustees should stand possessed of the Shares and the Residue of the Term, in Trust for his, the Testator's, Son, *Robert Dalzell*, until he should attain the age of Twenty-one years, and that the Dividends and Profits thereof should, from and after the decease of *Frances Dalzell* without Issue and Intestate as aforesaid, be applied for his use and benefit till he should attain his age of Twenty-one years; and, if he should attain his age of Twenty-one years, then that the Shares and the Residue of the Term should be assigned and transferred to *Robert Dalzell*, or as he should direct; but, in case *Robert Dalzell* should die before he should attain Twenty-one years, without Issue of his body living at his death, and Intestate, then that the Shares and Lease should be equally divided amongst his Trustees, their respective Executors and Administrators.

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And the Testator gave, devised and bequeathed all his Plantations, and all other his Estates, both Real and Personal, of what nature or kind soever, in the Island of *Jamaica*, to certain Trustees, their Heirs, Executors, Administrators and Assigns, in Trust to pay the Rents, Profits, Interest and Produce of one Moiety thereof to *Frances Dalzell*, during her life, for her separate use ; and, after her death, he directed the Trustees to convey and assign the said Moiety to and amongst the Issue of her body, at such time or times, and in such Shares or Proportions as she should, by her Will, appoint ; and, in default of such Appointment, then to and amongst the Issue of her body living at her death, their respective Heirs, Executors and Administrators, in equal Shares, as Tenants in Common ; and, in case *Frances Dalzell* should die without leaving Issue of her body, he directed his Trustees to pay and apply the said Moiety of the Rents, Profits, Interest and Produce of his said Real and Personal Estates in *Jamaica*, to and for the use and benefit of his Son *Robert Dalzell*, during his life ; and, after his death, he directed the Trustees to convey and assign the said Moiety to and amongst the Issue of the body of *Robert Dalzell*, at such time or times, and in such Shares or Proportions as he should, by his Will, appoint ; and, in default of such Appointment, then to and amongst the Issue of the body of *Robert Dalzell* living at the time of his death, their respective Heirs, Executors, Administrators and Assigns, in equal Shares and Proportions, as Tenants in Common. And the Testator directed his Trustees to pay and apply, the Rents, Profits, Interest and Produce of the other Moiety of his Real and Personal Estates in *Jamaica*, for the use and benefit of *Robert Dalzell*, during his life ; and, after his decease, to convey and

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assign the said Moiety to and amongst the Issue of his body, at such times, and in such Shares and Proportions as *Robert Dalzell* should, by his Will, appoint; and, in default of such Appointment, then to convey and assign, the said Moiety, to and amongst the Issue of the body of *Robert Dalzell* living at the time of his death, their respective Heirs, Executors, Administrators and Assigns, in equal Shares and Proportions as Tenants in Common: but, in case *Robert Dalzell* should die, in the Life-time of his Daughter *Frances Dalzell*, without Issue of his body living at the time of his death, then he directed his Trustees to pay, the said Moiety of the Rents, Profits, Interest and Produce of his said Real and Personal Estates in *Jamaica*, to his Daughter, *Frances Dalzell*, during her life, for her separate use, and, after her death, to convey and assign, the said Moiety, to and amongst the Issue of her body living at the time of her death, their Heirs, Executors, Administrators and Assigns, at such times, and in such Shares, as she should, by her Will, appoint; and, in default of such Appointment, then to and amongst the Issue of her body living at her death, their respective Heirs, Executors, Administrators and Assigns, in equal Shares, as Tenants in Common; and, in case both his Son and Daughter should die without Issue of their, or one of their bodies living at the time of their, or any one of their deaths, then he gave, devised and bequeathed his said Real and Personal Estates, in *Jamaica*, to his Trustees, their several Heirs, Executors, Administrators and Assigns, as Tenants in Common.

In June 1756 the Testator died. In 1801, *Robert Dalzell's* Moiety of the Testator's Real Estates, in *Jamaica*, was sold under an Act of the Assembly of

that Island, and the Proceeds were invested in the purchase, in the names of Trustees, of 4,979 *l.* 10 *s.* 5 *d.* 3 per cent Reduced Annuities.

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Robert Dalzell made his Will, dated the 28th of September 1816; and, thereby, in exercise of the Power given to him by the Will of *Gibson Dalzell*, appointed that the Net Proceeds, arising from the Sale of the Moiety of the Plantation and Premises; so sold as aforesaid, and invested in the said Bank Annuities, should be transferred to, and divided amongst his Three Children; and he gave and bequeathed the same in the Shares and Proportions following; namely, he appointed 50 *l.* Stock, part thereof, to be transferred unto his Son, the Plaintiff, *John Thomas Robert Dalzell*, his Executors, Administrators and Assigns; and declared that his reason for giving so small a portion to the said Plaintiff, was because he was already amply provided for. And the Testator, in like manner, appointed 50 *l.* Stock to be transferred to his Daughter, the Defendant, *Henrietta Teresa Carolina Jackson*. And, as to the residue of the said Reduced Bank Annuities, he directed the same to be transferred unto his Daughter, the Defendant, *Juliana Ann Mascall*, her Executors, Administrators and Assigns. And, as to all the rest, residue and remainder of his Estate and Effects, both Real and Personal, whatsoever and wheresoever, he gave, devised and bequeathed the same unto and to the use of his said Daughter, the Defendant, *Juliana Ann Mascall*, her Executors, Administrators and Assigns for ever.

The Testator, *Robert Dalzell*, died on the 16th of June 1821. At the time of his death, he had Issue,

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the Children named in his Will, and several Grandchildren and Great Grandchildren; and one of those Grandchildren was born at the Date of his Will.

The Bill was filed, by *John Thomas Robert Dalzell* and his two Sons, against the other Descendants of *Robert Dalzell*, and the Trustee of the 4,979 *l. 10 s. 5 d.* Reduced Annuities. It alleged that, according to the true construction of *Gibson Dalzell's* Will, all the Issue of *Robert Dalzell*, as well Grandchildren and Great Grandchildren, as Children, were entitled to have parts of the Fund transferred to them, after the decease of *Robert Dalzell*; and that *Robert Dalzell* ought to have appointed some part of the Fund to each of them; and that the Appointment he had made was wholly void. The Bill prayed that, in case the Court should be of opinion that *Gibson Dalzell* meant, by Issue of the body of *Robert Dalzell*, the remote as well as proximate Issue of *R. Dalzell*, living at the time of his executing his Power, or of his death, then that it might be declared that the execution, by *Robert Dalzell*, of his Power, was void, as being in favour of some only of the objects of it.

Mr. Sugden and Mr. Boteler for the Plaintiffs:—

The question is, what is the extent of the Power given to *Robert Dalzell* by the Will of *Gibson Dalzell*. This is not a Case in which the word, "Issue," is used, in different senses, in the disposition of the *Jamaica* Property; but, in every instance, it is used in the general and unlimited sense. The rule for giving the largest construction to that word, as to Real Estate, is stronger than in the case of Personal Estate. *Davenport v. Han-*

bury (a). There is another Case in the same Book, which is also an important Authority. *Freeman v. Parsley* (b). That Case relates both to Real and Personal Estate. The only Cases in which the word "Issue" has been construed in a restricted sense, are where it appears that the Testator intended to use it in that sense, or where there was no limit to the Issue who were to be the objects of his Bounty. But here, only the Issue living at the death of *Robert Dalzell* are to take. It was decided, in *Routledge v. Dorril* (c), that, if a Power is given to appoint to objects who are beyond the line of Perpetuity, the Donee may appoint to those who are within the line. The construction that we are contending for, is confirmed by the Gift over. For, by that Gift, the Trustees are to take, if both the Son and Daughter die, without Issue of their bodies living at their deaths. Now the Testator could not mean that, if at the death of the Survivor of his Son and Daughter, either of them had a Grandchild, though not a Child living, the Trustees were to take. We therefore submit that the word "Issue" means all the Descendants of *Robert Dalzell* living at his death. *Wyth v. Blackman* (d), *Gale v. Bennett* (e).

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Mr. *Tennant* for the Defendants, Mr. and Mrs. *Jackson*, who were in the same Interest as the Plaintiffs.

Mr. *Bickersteth* and Mr. *Broderick* for the Representatives of Mrs. *Mascall*.

It is clear that the word "Issue" may be construed

(a) 3 Ves. 257. (b) 3 Ves. 421. (c) 2 Ves. 357.

(d) 1 Vez. 196. S. C. Amb. 555; and see 3 Ves. 257, where this case is stated by M. R. from Reg. Lib.

(e) Amb. 681.

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to mean either Descendants or Children, according to the meaning affixed to it by the Testator himself; and the Court is bound to look at every part of the Will to see what meaning the Testator has himself ascribed to the word. The Testator, in declaring the Trusts of the Property disposed of, in the first part of his Will, uses the words "Issue" and "Child or Children" synonymously and interchangeably. It must, therefore, be intended that, when he used the word "Issue," in other parts of his Will, he meant it to be taken in the same sense. *Sibley v. Perry* (f).

The VICE-CHANCELLOR:—

In that part of the Will which relates to the *Jamaica* Estates, the word "Issue," must, I think, be taken to be used in its general sense. And it seems to me that, in the first part of the Will, it must be taken in the same sense, and that the words "Child or Children," must be considered as synonymous with "Issue." For the Testator could not intend that, if his Daughter, *Frances Dalzell*, left a Grandchild and no Child, the Property should go over to his Son; or that, in case of a similar event as to the Son, the Property should go to the Trustees.

But supposing that the word "Issue," in the former part of the Will, is to be narrowed so as to mean "Child or Children," it is singular that the Testator has not used a similar phraseology in the latter part of his Will. It must, therefore, be intended, that the word "Issue," in the latter part of the Will, was used in the sense it generally bears.

(f) 7 Ves. 522.

MAPLES v. BROWN.

PETER SERS, by his Will, dated the 6th of April 1811, directed that 3,000*l.* should be raised and received, by *W. Maples* and *J. Brown*, at the expiration of three years from his death, and be, from thenceforth, held by them in trust to invest the same in Government or real Securities, in their names, and to pay the Interest and Dividends thereof to his Daughter, *Charlotte Sers*, during her life, for her separate use, and, after her decease, to assign and transfer the Capital to such persons and in such Shares as she, whether covert or sole, by her Will, or any Writing purporting to be her Will, should give or dispose of the same, and, for want of such Gift or Disposition, unto her next of kin. On the 30th of November 1811, the Testator died.

Charlotte Sers, by her Will, dated the 5th of June 1818, after bequeathing some pecuniary Legacies, gave all the rest, residue and remainder of her Monies, Securities for Money, Goods, Chattels, Personal Estate and Effects whatsoever and wheresoever, unto her Executors, upon trust to convert such part thereof as should not consist of Money, into Money, and to collect and receive all Money owing to her at her death, and to invest the same in the usual Securities; and, subject to certain Annuities, she gave the said Trust Monies, Stocks, Funds and Securities, unto the Children of her Sister *Elizabeth Brown*. The Testatrix then proceeded as follows:—" I also give, devise and bequeath, unto all and every the aforesaid Child and Children of my said Sister *Elizabeth Brown*, all contingent or other sum and

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5th June.

Appointment.

Testator gave 3,000*l.* to Trustees, for *C. S.* for life; Remainder to such Persons as she should appoint.

C. S. by her Will, disposed of all her Personal Estate, and then gave all Sums, Messuages, &c. and other Interest to which she was entitled under the Testator's Will. Held that the latter Gift was a good execution of the Power.

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sums of Money whatsoever, and also all Messuages, Lands, Tenements and Hereditaments, and Parts and Shares of Messuages, Lands, Tenements and Hereditaments, Reversions, Remainders, Expectancies, and other Interest to which I am, or shall or may hereafter become entitled unto, under and by virtue of the provisions and directions contained in the last Will and Testament of my late Father, *Peter Sers*, Esq. deceased; to hold all and singular the said last-mentioned contingent Personal and Real Property, and Premises, of every description, unto the said Child and Children, his and their Heirs, Executors and Administrators, for such and the like Interest and Estates, and in such manner as the aforesaid Trust-mones are bequeathed to him, her and them."

In the course of the Cause a Petition was presented, by the Children of *Mrs. Brown*, praying that it might be declared that the Disposition, made by *Charlotte Sers*, of all her Interest under the Will of her Father, was a valid appointment thereof in favour of the Petitioners.

That Petition now came on to be heard.

Mr. Horne and *Mr. Collinson* for the Petitioners.

Mr. Parker for *Mr. and Mrs. Brown*.

Mr. Girdlestone for the next of Kin of *Charlotte Sers*:—

The question is, whether this Lady has given that over which she had a Power, or only what she had an Interest in. It is clear, from the words used, that she has disposed of that only in which she had an Interest. She has a Life-interest only in the 3,000 *l.* under her

Father's Will, with a power to appoint the Capital; and I submit that she has not executed that Power, but merely given what she had an Interest in.

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The VICE-CHANCELLOR:—

The Testatrix, in the former part of her Will, disposes of all her Personal Estate; therefore, the words at the latter end cannot refer to what was her own, as they would be superfluous. It is, therefore, on the view of the latter words, as contrasted with the former ones, that I hold the Will to be an execution of the Power.

DUNN v. DUNN.

11th June.

JOHN DUNN, by his Will, gave all his Real and Personal Estate to his Son, *John William Dunn*, and appointed *J. W. Dunn*, his sole Executor. The Testator died in April 1827; and his Will was proved by *J. W. Dunn*. In December 1827 *John William Dunn* died intestate, leaving a Son and three Daughters, all infants, who were the Plaintiffs in the Cause, and a Widow, *Frances Dunn*, who was the Defendant. The Intestate died seised of some Real Estates, besides those devised to him by his Father. *Frances Dunn* took out Letters of Administration to her late Husband, and also to *John Dunn*, and entered into the possession of the Real Estates, as the natural Guardian of her Son. The Bill prayed for Accounts of the Real and Personal Estates, both of the Testator and the Intestate, and for a Guardian and Maintenance.

Multifarious-
ness.

The infant Heir and only Son of an Intestate, joined with his Sisters in a Bill, against their Mother, the Administratrix, for an Account of the Intestate's Real and Personal Estates.

Demurrer for Multifariousness allowed.

The Defendant demurred to the Bill, because it sought discovery and relief respecting the Personal Estate of the Testator, and also respecting the Real and Personal

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Estates of the Intestate, which matters had no dependence on, or connection with, each other; and because it sought discovery and relief respecting the Real and Personal Estates of the Intestate, in the former of which the Plaintiff, *John Dunn*, was alone interested, but, in the latter, all the Plaintiffs were jointly interested.

Mr. *Sugden*, Mr. *Wakefield*, and Mr. *Dunn*, in support of the Demurrer, said that, if the Heir were to die, there would be no person on the Record to represent the Interest which he had at the time of filing the Bill; and they cited *Maud v. Acklom* (a), and *Harrison v. Hogg* (b).

Mr. *Bickersteth* and Mr. *Teed*, in support of the Bill:—

If the Plaintiffs have all a common Interest, the Bill is not multifarious, because there is another subject of the Suit in which they are not all interested (c). If the Son had been the only Child, the same objection might have been made to the Bill; for, if he were to die, the Real Estate would go to one person, and the Personal Estate to another; but, as the family is now constituted, his Sisters would be his Co-heirs, and would be entitled to prosecute the Suit. *Salvidge v. Hyde* (d), and *Knye v. Moore* (e).

(a) Decided by Sir John Leach, V. C. on the 26th of April, 1820. See a Note of this Case, *post*. 331.

(b) 2 Ves. J. 323.

(c) See *Turner v. Robinson*, 1 Sim. & Stu. 313 and 6 Madd. 94. Upon this case being cited in the argument of a demurrer for multifariousness, in *Marcos v. Pebrer*, before the Vice-Chancellor on the 8th of May 1830, His Honor said, that he could not coincide with the decision in the case cited: as he could not see how a person being interested in the personal estates of two Testators, could, consistently with the rules of the Court, unite the two estates in the same suit.

(d) 5 Madd. 138; but see Jacob's Rep. 151.

(e) 1 Sim. & Stu. 61.

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The VICE-CHANCELLOR :—

The Case of *Knye v. Moore* is distinguishable from the present one; for, in that Case, the provision was made for the Mother, she undertaking to maintain the Children; and, therefore, the Children had a joint Interest with the Mother. Here the Interests in the Real and in the Personal Estate are distinct from each other.

Demurrer allowed.

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JOHN MAUD and MARY his Wife, HANNAH STOKER, Widow, and SARAH PICKWELL, Widow, v. GEORGE ACKLOM*.

1820 :
26th April.

*Multifarious-
ness.*

ELIZABETH HARRISON, being seised of Realty, and possessed of Personalty, died on the 26th of November 1818, intestate, leaving the female Plaintiffs her next of Kin, and the Plaintiffs *Hannah Stoker* and *Mary Maud* her Co-heirs. The Defendant *George Acklom* took out Letters of Administration to the Intestate, alleging that he was her next of Kin, possessed himself of the Personalty, and paid the Debts of the Intestate, and applied the residue to his own use. He also possessed himself of the Title Deeds, and entered into the possession of the Realty.

A. B. and C. being the next of Kin, and *B.* and *C.* the Co-heirs of an Intestate, file a Bill against *D.* for an Account of the Real and Personal Estates of the Intestate. The Bill is multifarious.

The Bill alleged that the female Plaintiffs were the next of Kin, and that the Plaintiffs *Mary Maud* and *Hannah Stoker* were the Co-heirs of the Intestate, and that the Defendant was not related to her: that the Intestate

* Mr. Dunn kindly furnished the Editor with the above Note of this Case.

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had Books, &c. containing entries of pedigree, which the Defendant had possessed himself of: and that, at the Intestate's death, the legal Estate was outstanding in Trustees or Mortgagees; and that the Defendant threatened to set up that Estate if the Plaintiffs should bring an Action of Ejectment against him. The Bill prayed for an Account of the Personal Estate, and that it might be duly administered, and the clear residue thereof be ascertained and equally divided between the Plaintiffs *H. Stoker, Sarah Pickwell, and Maud* and his Wife; and that an account might be taken of the Rents of the Real Estates; and that the Defendant might be decreed to pay to the Plaintiffs, *Maud* and Wife and *H. Stoker*, what, upon taking such Account, should appear to be due from him; and might be decreed to deliver up to them the possession of all the Real Estates, together with the Title Deeds; and that he might be restrained from setting up any outstanding Legal Estate as a Defence to any Action of Ejectment which might be brought by the Plaintiffs to recover the Possession of those Estates.

The Defendant demurred to the Bill, because, by the Plaintiffs' own showing, they were jointly interested only in the Personal Estate of the Intestate, and the Plaintiffs *Maud* and Wife and *H. Stoker* only, were interested in her Real Estates, and the Plaintiff, *Sarah Pickwell*, had no interest in such Real Estates: and, therefore, such several matters ought not to be joined in one Bill.

Mr. *Bell* and Mr. *Parker* in Support of the Demurrer.

Mr. *Agar* and Mr. *Duckworth* in Support of the Bill.

The Vice-Chancellor (a) allowed the Demurrer.

(a) Sir J. Leach.

FITZGERALD v. STEWART.

1828 :
11th and 12th
June.

Equity.
Appropriation.
Consignees.

THE Plaintiff was entitled to an Annuity of 325 *l.* payable out of certain Estates in *Jamaica*, and to the Sum of 17,600 *l.* Currency, charged thereon with Interest at Six per Cent ; and, subject thereto, *George Reid* was entitled to 15,321 *l.* 10 *s.* 7 *d.* Sterling, and Interest, also charged upon the same Estates, which, subject to these Incumbrances, were the absolute Property of *Edward Dalling Fitzgerald*. In 1814, the Annuity and the Interest on the two other Sums had become greatly in arrear ; upon which *Reid* filed a Bill, in the Court of Chancery in *Jamaica*, against the Plaintiff and *Edward Dalling Fitzgerald*, for the purpose of having the produce of the Estates applied in satisfaction of the Incumbrances. In pursuance of an Order made, in that Suit, in May 1815, *Edward Dalling Fitzgerald* was appointed Receiver of the Estates, and was ordered to pay, to the Plaintiff, in *London*, the Annuity and Interest due to her, out of the first proceeds of the Estates, and to ship and consign all the Sugar then made or to be made thereon to *Reid*, for Sale.

A Receiver of an Estate in *Jamaica*, appointed by the Court of Chancery there, in a Suit, by a second Incumbrancer, to have the Proceeds of the Estates applied in satisfaction of the Incumbrances, was ordered, out of the first Proceeds, to pay to *A.* the first Incumbrancer, in *London*, the Interest on her Charge, and to consign the Produce to *B.*

the Plaintiff, a Merchant in England, for sale. The Receiver, on making the first Consignment, sent the Bill of Lading to *A.*, with directions to deliver it to *B.*, on payment of her Interest. The Consignments were afterwards made, by *B.*'s direction, to other Merchants, who, for several years, continued to pay *A.* her Interest ; but afterwards ceased to do so. Upon which she filed a Bill in this Country, against them, the Receiver and the Owners of the Estate, for an Account of the Consignments and payment of her Interest, charging collusion between the Consignees and the Receiver.

Demurrer, by the Consignees, for want of Equity, over-ruled.

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In 1815, *E. D. Fitzgerald* died, having devised his Estates to his Sons, the Defendants *Edward Fitzgerald* and *Thomas Fitzgerald*, and appointed the Defendant *Wentworth Bayly* and one *Cozens* his Executors; who, in 1816, were appointed Receivers of the Estates, in his place, and were ordered to conform to the directions contained in the Order before mentioned. In May 1816, *Bayly* and *Cozens* wrote a Letter to the Plaintiff, and enclosed in it a Bill of Lading of 160 Hogsheads of Sugar, on which was an Indorsement addressed to the Captain of the Ship by which the Sugar was sent, directing him, in case *Reid and Co.* should give satisfactory Security to the Plaintiff, agreeably to the Order of the Court of Chancery in *Jamaica*, to pay to her the amount of her Annuity and Interest, to deliver the Sugar to them, otherwise to the order of the Plaintiff. The Letter, in which the Bill of Lading was sent, was as follows: "*Jamaica*, May 3d, 1816.—Madam, The Master not having as yet made his Report on the Arrears of your Annuity, we have acted on the Order, issued on the 9th of May last year, directing your Son, as Receiver of the Estate, to pay your growing Annuity out of the proceeds of the Property, and the Interest of 17,600 *l.* Currency, for which we have now enclosed indorsed, a Bill of Lading on 160 Hogsheads of Sugar, and which, on compliance of the holders of the Mortgage, whoever they may be, you will please to deliver up to them. This will be, when received, one year's payment to the 9th May, inst.—We have the honour to be, &c."

Afterwards, the Receiver, by the Order of *Reid and Co.* consigned the produce of the Estates to *Milligan and Co.*

West India Merchants in *London*; and they, out of the produce so consigned to them, by the orders of *Reid*, and, in pursuance of the orders under which the Receivers were appointed, paid to the Plaintiff her Annuity and Interest. Before the year 1818 *Cozens* died; and, on the 27th of January in that year, the Defendant *Bayly* was appointed sole Receiver of the Estates, and was directed to pay, to the Plaintiff, her Annuity and Interest pursuant to the Order of May 1815. *Bayly* continued to consign the Produce to *Milligan* and *Co*; and they continued to pay to the Plaintiff, thereout, her Annuity and Interest until 1819. In and after that year down to 1821, *Bayly*, at *Reid*'s request, consigned the Produce to the Defendants *Stewart* and *Westmorland*, Merchants and Copartners; and they, by *Reid*'s directions, and in pursuance of the Order under which the Receivers were appointed, paid, to the Plaintiff, her Annuity and Interest out of the Produce so consigned to them. In May 1821 one *Crossley* was appointed Joint-Receiver with *Bayly*, and they were ordered to conform to the orders made on former Receivers. *Bayly* and *Crossley* continued to make the Consignments to *Stewart* and *Westmorland*; and they, by *Reid*'s desire, and in pursuance of the Order by which the last-named Receivers were appointed, continued to make the Payments to the Plaintiff. In 1822, *Crossley* being dead, *Bayly* was, on the petition of *Reid*, removed from being Receiver, and one *Stevenson* was appointed in his place. The Order by which that appointment was made, directed *Stevenson* to conform to the Order of May 1815, in so far as it directed the Receiver to pay, to the Plaintiff, her Annuity and Interest out of the first proceeds of the Estates that should come to his hands, and to ship and consign, the Sugar made on the Estates,

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to the Defendant *Stewart*. *Stevenson* accordingly consigned the Sugar to *Stewart* and *Westmorland*; and they, by his desire, and in compliance with the Orders of the Court, continued to pay to the Plaintiff her Annuity and Interest. On the 6th of February 1824, an Order was made, on the Petition of *Bayly*, by which he was appointed Joint-Receiver with *Stevenson*, and they were directed to conform to the directions contained in the Order made on the appointment of *Stevenson*, and such of the other Orders previously made on the Receivers of the premises, as were then in full force. In pursuance of this last Order, *Bayly* and *Stevenson* continued to consign the produce of the Estates to *Stewart* and *Westmorland*, down to the time of filing the Bill; and they continued to pay, the Annuity and Interest, to the Plaintiff until the 1st of January 1825. The Receipts given to *Stewart* and *Westmorland* for the Sums paid by them to the Plaintiff, expressed the payments to have been made by the hands of the Consignees.

The Bill, after stating as above, alleged that *Stewart* and *Westmorland* had, from time to time, since January 1825, received large Consignments of Sugar and other Produce from *Bayly*, (who, by the death of *Stevenson*, had become the sole Receiver), and had sold the same, and received the Proceeds; that they held and possessed such Consignments and Proceeds, in trust, amongst other things, to pay, to the Plaintiff, her Annuity and Interest, but that they had applied the same to their own use; and that the Annuity and Interest remained unpaid since the 1st of January 1825. The Bill charged that *Bayly*, by the order of the Court of Chancery in *Jamaica*, under which he was appointed Receiver, was directed, out of the first Proceeds of the

Estates, to pay, to the Plaintiff, her Annuity and Interest: that he had consigned, to *Stewart* and *Westmorland*, and that they had received the Produce of the Estates, subject to the payment of, and in trust, or under orders to pay such Annuity and Interest: that *Bayly* and *Reid* had, from time to time, sent Letters to *Stewart* and *Westmorland*, directing them to pay the Annuity and Interest out of the first Monies arising from the Sale of the Produce of the Estates; and that, under such circumstances, *Stewart* and *Westmorland* were Trustees of those Monies for the Plaintiff, to the extent of the payments due to her; that, in consequence of some large mercantile dealings between *Bayly* and *Stewart* and *Westmorland*, *Bayly* had become indebted to them to a large amount, and that they were colluding with him for the purpose of procuring their Claims against him to be satisfied out of the Monies in their hands, which were due to the Plaintiff, or which they had received and possessed in trust for the Plaintiff, to the extent of the payment of her Annuity and Interest, and that *Stewart* and *Westmorland* intended to apply the Monies and Produce to their own use, in satisfaction of their Claims on *Bayly*. The Bill prayed for an Account of what was due, to the Plaintiff, for her Annuity and Interest, since the 1st of January 1825, and of the Produce received by *Stewart* and *Westmorland* since that time, and the Monies arisen from the Sale thereof: that *Stewart* and *Westmorland* might be decreed to pay, to the Plaintiff, what was due to her for her Annuity and Interest, out of the Monies arisen from the Produce of the Estates consigned to them: that they might be restrained from applying such Monies to their own use, or to any other purpose than that of paying, to the Plaintiff, what was due to her;

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and that the Orders of the Court of Chancery in *Jamaica* might be enforced for the Plaintiff's benefit.

The Defendants, *Stewart* and *Westmorland*, put in a general Demurrer to the Bill, for want of Equity.

Mr. *Sugden*, and Mr. *Pemberton*, for the Defendants in support of the Demurrer:—

The Plaintiff was and still is a Party to the Suit in *Jamaica*. The Receiver was appointed, if not upon her application, with her consent; and the Payments to the Plaintiff, were directed to be made by the Receiver, and not by the Consignees, over whom the Court has no control, and who are liable to account to no one but their Principals. The Receivers are charged, in the Court in *Jamaica*, with all the Sums which they receive. The Plaintiff, who is a Party to the Suit in that Island, has a right to call on them to pass their Accounts there. How can she be entitled to file a Bill here, for the purpose of taking the same Accounts, against the Agents, as she has taken, in *Jamaica*, against the Principals. If this Plaintiff can file a Bill against these Consignees, every Creditor may, on the same principle, file a Bill against them. A *Cestui que Trust* has no right to follow Property which has been handed over, by the Trustee, to a third person. If a Decree were now made, the Receiver might have previously passed his Accounts in *Jamaica*, and paid in his Balances. It is not improbable that the rules for taking Accounts in *Jamaica*, are different from what they are here. Is then the Account taken here, or the Account taken in *Jamaica* to be binding? The Accounts can not be taken, against the

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Agent, in the absence of the Principal. If this Bill is sustained, not only the Merchant here, but the Officer of the Court in *Jamaica*, will be doubly vexed; for a Right of Action against him will be given to his Agents. There is nothing on the face of these proceedings which can give the Plaintiff a right to say that the Property in the hands of the Consignees is her Fund. She cannot succeed, unless she can lay her hand on some part of the Property, and say that that is her Fund, dedicated to pay her demand. The Plaintiff cannot make out such a case of appropriation as will entitle her to the Relief she prays. For anything that this Court can know, the Receiver may be in advance, to the full amount of the Consignments, or the Receiver may have other demands upon the Estate, for the extinction of which the whole Proceeds of the Consignments may be required. In order to give a Right of Suit to a party for whose benefit a Sum of Money is transmitted to a third person, that person must bind himself, by his own acts, to apply it for the purpose for which it was transmitted. He must accept it for that purpose. The mere allegation in the Bill that these Defendants were Trustees for the Plaintiff, will not give the Court jurisdiction, unless it is borne out by the circumstances of the Case. Though the Defendants might have received orders, from *Bayly*, to pay, to the Plaintiff, her Annuity and Interest, it does not appear that those orders were communicated to the Plaintiff. These Defendants never entered into any engagements to make the Payments. They may have received the Consignments under orders to pay the Plaintiff's Demands, but they have not acquiesced in those orders. If the Plaintiff has any Claims, she may enforce them against *Bayly*. Wil-

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liams v. Everett (b), Worrall v. Harford (c), Wallwyn v. Coultis (d), Ex parte South (e).

Mr. *Bickersteth*, and Mr. *Spedding*, for the Plaintiff:

These Merchants have been in the course of receiving Money for a purpose which they have long applied it to : would it not then be extraordinary if they could not be compelled to go on in the same course? The Plaintiff is directed, by the orders, to be paid out of the first Proceeds of the Estate. The Receiver, in the first instance, consigns the Goods, and gives directions that, unless the Consignees will undertake to pay the Plaintiff, the Goods are to be delivered, not to the Consignees, but to the Plaintiff. It was only by the Consent of the Plaintiff that the Consignees could have received the Proceeds. The Consignees have always received the Goods on a clear understanding that, out of the Proceeds, the Plaintiff was to be paid. No express Contract is required to give to the Plaintiff the Right which she is seeking to enforce. It is sufficient that one may be implied from the Proceedings that have taken place. The Consignees have received these Proceeds under the orders, for the purpose of applying them according to the orders ; but, instead of doing so, they have applied them to pay a Debt due to them from *Bayly*. Here is a Right in a particular Fund declared ; and that Fund is traced to the hands of a particular Person. By acting in obedience to the Orders, the Consignees have acknowledged the Trust ; the Plaintiff has acted on the faith of it ; and, by that means, the

(b) 14 East, 582.

(c) 8 Ves. 4.

(d) 3 Mer. 707.

(e) 3 Swanst. 392.

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relation of Trustee and *Cestui que Trust* was established. They have never terminated that relation, except by a Breach of the Engagement. The Condition which was imposed on the first Consignees, must be considered to have been imposed on all the subsequent Consignees.

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Mr. Pemberton, in Reply :—

If the Defendants have contracted to pay the Monies to the Plaintiff, can she file a Bill against them in this Court? Ought she not to have brought an Action for Money had and received to her use? If the Case be as it is represented, what have the *Fitzgeralds* and the other Defendants to do with it? The Receipts express that the Monies were paid by the Defendants, as the Agents of the Receivers. Their Principals acted under the Orders of the Court in *Jamaica*, but the Defendants did not. The Allegation, in the Bill, is that the Receivers, from time to time, gave us orders to pay the Money to the Plaintiff; but the Bill also states that we have now received contrary directions.

The VICE-CHANCELLOR :—

I think that there is sufficient charge in this Bill to make the Defendants liable to account, to the Plaintiff, for the sums in their hands.

The short state of the Case is this.—[His Honor here detailed the material contents of the Bill.]—I do not intend to disturb the Rule of Law as it is established by *Williams v. Everitt*; but that Case does not govern the present one; for all that it decides is that, where an Order is given by a Debtor, to a third

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person, to pay a Sum of Money to his Creditor, and that third person refuses to comply, the Creditor cannot maintain an Action against him for the amount. *Scott v. Porcher (f)*, is a decision to the same effect: and I apprehend that both those Cases are undisputed Law. Here it appears that express directions were given to *Stewart* and *Westmorland*, to apply the Proceeds of the Consignments, to keep down the Annuity and Interest due to the Plaintiff; and that, from the time when the Receivers were first appointed, down to 1825, the Consignees acted under the Orders by which the Plaintiff received her Annuity and Interest; and it is charged that *Stewart* and *Westmorland* have, since 1825, received directions to keep down the Annuity and Interest. In this Case it has been notified, to the Plaintiff, that the Consignees have been directed to pay to her the Annuity and Interest; and when it is stated that they hold the Monies under an express Trust to pay her, and are colluding with *Bayly* for the purpose of procuring their claims against him to be satisfied out of the Monies in their hands which are due to the Plaintiff, I cannot but take it to be stated that they hold the Monies applicable to the Plaintiff's claim, and that they are colluding with *Bayly* to defeat that claim.

This Court is not ousted of its jurisdiction because the Plaintiff might have brought an action, against *Stewart* and *Westmorland* for the amount of the Annuity and Charge. That objection was raised, by the Court itself, in *Scott v. Porcher (g)*, and was answered by Mr. Bell; and Sir W. Grant, M. R., made a Decree for the Plaintiffs. My opinion, therefore, is, without meaning to disturb any Rule of Law, that there is

(f) 3 Mer. 652.

(g) See 3 Mer. 659.

enough on this Record to enable me to say that these Defendants must answer the Bill; and I should be defeating the Law if I did not make the Order I now do.

Demurrer overruled.

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NOBLE v. CASS.

MARY EDWARDS, Widow, by her Will, bearing date the 13th of October 1787, devised unto *John Cass* and *Samuel Abbott*, and their Heirs, a Freehold Messuage, Land and Premises, at *Walthamstow*, upon Trust, for her Daughter, *Ann Edwards*, during her life; and after her decease, to the use of *Cass* and *Abbott*, and the Survivor of them, and the Heirs of such Survivor, during the life of the Testatrix's Niece, *Ann Noble*, then the Wife of *Joseph Noble*, in Trust to pay to her the Rents and Profits thereof during her life, for her separate use; and, after her decease, the Testatrix devised the Premises unto such Child or Children of *Ann Noble* as should be living at her decease, as Tenants in Common in Fee Simple; and she appointed *Ann Edwards*, and *Cass* and *Abbott*, her Executors.

The Testatrix died on the 13th of September 1789, and her Will was proved by all her Executors.

Upon the death of the Testatrix, the Trustees paid the Rents of the Premises at *Walthamstow* to *Ann Edwards*, during her life. She died on the 19th of

17th June,
19th November,
and
5th December.

Tenant for Life
and
Remainderman.

Devise to
Trustees and
their Heirs dur-
ing the life of
A. in trust for *A.*
and after his
decease, to *B.*
in fee.

The Trustees
recover, in *A.*'s
lifetime, Da-
mages for
Breach of Cove-
nants in a Lease
granted by the
Testatrix, and
still subsisting.
A. dies. The
Damages be-
long to her
Estate.

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CASS.

October 1794, and, upon her death, the Trustees paid the Rents to *Ann Noble*. *Cass* survived *Abbott*, and died in May 1805, intestate, leaving the Defendants, *Elizabeth Cass* and *Phebe Cass*, his only Children, his Co-heirs.

By an Indenture dated the 1st of September 1783, the Testatrix had demised the Premises to *Joseph Noble* from the 24th of June then last, for five years, at the rent of 12*l.*, and, from the 24th of June 1788, for sixty-one years, at the rent of 30*l.*

After divers Mesne Assignments, the Term became, in the year 1814, vested in *John Strettle Brickwood*; and, in the same year, *Elizabeth Cass* and *Phebe Cass* brought an Ejectment for, and recovered Possession of the Estate. In Trinity Term 1815, the same persons brought an Action, against *Brickwood*, for breach of the Covenants in the Lease, and for Dilapidations of the Premises, and obtained a Verdict for 500*l.* Damages. The Defendants, upon receiving that Sum, invested it in the purchase of 672*l.* 2*s.* Four per Cent Annuities, in their own Names. On the 11th of March 1819, *Ann Noble* died intestate, leaving the said *Joseph Noble*, her Husband, her surviving, and the Plaintiffs, and the Defendant, *Sophia Noble*, her Children. *Sophia Noble* afterwards took out Letters of Administration to her late Mother; and, upon the death of *Joseph Noble*, his Son, the Plaintiff *Joseph Richard Noble*, took out Letters of Administration to him.

The Bill prayed that the Dividends accrued due on the 672*l.* 2*s.* Stock, in the life-time of *Ann Noble*, might be paid to the Defendant *Sophia Noble*, the

personal Representative of *Ann Noble*, and that the Dividends since accrued due, together with the Capital, might be transferred and paid to the Plaintiffs and the Defendant *Sophia Noble*.

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v.
CASS.

The Defendants, *Elizabeth Cass* and *Phebe Cass*, in their Answer, said that, in the year 1814, an Ejectment was brought, in their names and on their behalf, to obtain Possession of the Estate at *Walthamstow*, and that they recovered Judgment in such Action, and that Possession of the Premises was delivered to them; that, in Trinity Term 1815, they caused an Action of Covenant to be commenced against *Brickwood*, for Damages for Breach of Covenants in the Lease and Dilapidations of the Estate, and that they declared, in that Action, as Assignees, for the life of *Ann Noble*, of the reversion of the Premises expectant upon the Lease, and that they recovered a Verdict for 500 *l.* Damages: they added that they had been advised that it was doubtful whether the 500 *l.* recovered in the Action of Covenant, were to be considered as a Compensation for the Injury done to the Estate, which the Defendants held, in the Freehold Premises, for the life of *Ann Noble*, and in Trust for her, and, consequently, as forming part of her Personal Estate, or as a Compensation for the Injury done to the Inheritance, and, consequently, subject, as Land, to all the same Uses to which the Freehold Premises were limited by the Will.

Mr. *Sugden*, and Mr. *Parker*, for the Plaintiffs, contended that the Testatrix had, in the first instance, given the Fee Simple in the Estate at *Walthamstow* to the Trustees; and, therefore, that they recovered in the Action, not only for the Benefit of *Ann Noble*, but of

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CASS.

all those who were interested in the Inheritance ; and that, consequently, the 500*l.* formed part of the Inheritance.

Mr. *Preston*, and Mr. *Garratt*, for the Defendants,
Elizabeth Cass and *Phebe Cass*.

If during the life of a Tenant for Life, a stranger wrongfully cuts Timber on the Estate, the Tenant for Life may bring an Action of Trespass against him, and the Reversioner has a separate and distinct Action. Now, what have we in our hands that belongs to the Reversioner? Where is the right at Law upon which Equity is to ingraft its jurisdiction? If there is no right at Law, there can be none in Equity. A Reversioner never gets any of the damages that have been recovered by a Tenant for Life.

Mr. *Keene*, Mr. *Lloyd*, and Mr. *Paynter*, appeared for other Parties.

The VICE-CHANCELLOR :—

The question, in this case, is, whether the Fund in question belongs to the Children of *Ann Noble*. It was urged, in the argument, that the damages were something accruing to the inheritance ; but no authority was produced to show that a Court of Equity has ever held that damages were any thing but the personal Estate of the person who recovered them ; and it appears to me that I should be introducing a new Equity, if I were to hold that damages recovered in an Action for a breach of a Covenant running with the Land, are to be considered as part of the Inheritance.

Then it was said, that this Case might be likened to a Case where an insurance against fire is effected by

a Tenant for Life; and it was asserted that, if the Money was recovered from the Office, it must be considered as going with the Land. This point was certainly urged in argument in the Case of *Norris v. Harrison* (a), but no authority was cited in support of it. The decision there turned on the acts of the Party, and the expressions in the Will, and not on any abstract rule of Equity, that the Money paid on the Policy of Insurance effected by the Tenant for Life, was to be considered as belonging to the Inheritance. The *Vice-Chancellor* in his Judgment, after stating that he thought that *Webb* was clearly entitled to the Fund, proceeds thus: "The Testator, *William Bell*, appears by his Will, to have thought so, for he conscientiously states the circumstances. He appears to set apart the Money as belonging to the Remainderman, describing it as part of and belonging to what was the real Estate of his Brother *John Bell*. If the house had been rebuilt, it would have gone to the persons successively entitled. The Insurance was for the benefit of all Parties. The Money was not laid out, but set apart to ameliorate and restore the real Estate. Those who claim under the Testator cannot dispute his abandonment of any claim on this Fund. It is evident that both *John*, and the Testator *William Bell*, considered this Money as liable to the uses of the Settlement." I think, therefore, that this Case is no authority for me to say that these damages are to be considered as an accretion to the Inheritance.

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Where a Case is at all doubtful, the best way is to follow the Law. Now, *Littleton* says (b): "Also as to

(a) 2 Madd. 268.

(b) Sect. 315.

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Actions Personals, Tenants in common may have such Actions Personals jointly in all their names, as of Trespass, or of Offences which concern their Tenements in common, as for breaking their Houses, breaking their Closes, &c. In this case, Tenants in common shall have one Action jointly, and shall recover jointly their Damages, because the Action is in the personalty, and not in the realty." And Lord *Coke*, in commenting on this section says: "If the Aunt and Niece join in an Action of Waste, for Waste done in the life of the other Sister, the Aunt shall recover the Damages only, because the same belongs not by Law to the Niece (c)." Therefore it is plain that the spirit of the Law is that, with respect to injuries to Land for which damages are to be recovered by personal Action, the person who brings the Action is entitled to the Damages. My opinion, therefore, is that the principal Fund belongs to the Administratrix of *Ann Noble* (d).

Bill dismissed, with Costs.

1828:
12th and 14th
June.

Application of
Payments.
Legacy.

(c) Co. Litt. 198, a.

(d) See *Evelyn v. Raddish*, 1 Holt's N. P. C. 543.

THOMAS v. MONTGOMERY.

THE late Duke of *Queensberry* died on the 23d of December 1810, having given, by his Will, Legacies to a large amount, which he directed should be paid within three months after his decease. By an Order made in the Cause, on the 14th of August 1817, with the consent to pay the Legacies with Interest, it was ordered that the Master should ascertain one fourth part of the Legacies and Interest, and that the same should be paid out of a Fund in the Cause: Held, that the Payment ought to be applied, first, in discharge of the whole of the Interest on the Legacies, and then in the reduction of one fourth of the Principal.

currence of the Residuary Legatees, it was referred to the *Master* to compute Interest on the Legacies, from the date of a former Report, and to add the same to the amount of what he had then reported to be due for Principal and Interest of such Legacies; and he was to ascertain one fourth part of what was due, to each of the Legatees, on account of their Legacies and Interest. And it was ordered that so much of a certain Fund in the Cause, as would be sufficient to raise what the *Master* should certify to be the one-fourth part of the Legacies and Interest, should be sold; and that, out of the Money to arise by the Sale, the one-fourth part of the Legacies and Interest should be paid to the Persons to whom the *Master* should certify the same to be due. In January 1818 the *Master* reported what was due for Interest on the Legacies, and added the amount to the Principal, and then stated what was one fourth part of the aggregate sum. That fourth part was afterwards paid. By another Order, of the 21st of May 1824, the *Master* was directed to take an Account of what remained due to the Legatees, for Principal, in respect of their Legacies, at the date of his Report of January 1818, after deducting the payment then made, from the amount of the Principal and Interest, as found by the last-mentioned Report; and to compute Interest upon what he should find to be so remaining due to the Legatees, after such deduction, and add such Interest to what he should find to have remained due to such Legatees, down to the date of his Report to be made in pursuance of that Order. It appeared, by the Report made in obedience to this last Order, that the *Master*, in taking the Account directed by it, had ascribed the payment made under the Order of August 1817 in discharge, first, of the Interest then due on the Legacies,

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and then of so much of the Principal as that payment would extend to discharge. To this Report an Exception was taken by the Residuary Legatees, who were Defendants.

The Exception, after setting forth the Order of August 1817, submitted that, after the payment thereby directed was made, the one-fourth part of the Legacies, and the one fourth part of the Interest, became distinguished by virtue of that Order, and that three fourth parts only of the said Legacies then remained due.

Mr. *Horne*, Mr. *Sugden*, Mr. *Treslove* and Mr. *Lynch*,
in support of the Exception :

The *Master* has put a construction upon the Order of August 1817, which is contrary both to its language and to its spirit ; for, instead of referring the payment to the discharge of a fourth of the Principal and Interest, he has applied it, in the first place, to the discharge of all the Interest. The Order must be construed according to the rights of the Parties ; and, when that Order was obtained, the Legatees could not have gotten a single shilling hostilely to the Residuary Legatees. The object of the Court was not to put the Legatees in a better situation than if the Cause had been regularly heard for further directions. They would then have been entitled to receive their Legacies, with simple Interest only ; but, if the *Master's* construction is adopted, they will, in effect, receive compound Interest, and injustice will be done to the Residuary Legatees, who would not have consented to the Order, unless they had construed the prayer of the Petition in the same manner as they now contend that this Order ought to be construed. Suppose that, in the ordinary case of

Debtor and Creditor, a letter were written, by the Creditor to the Debtor, informing him that a large sum was due for Principal and Interest, and requesting to be paid one fourth of the Debt, and one fourth of the Interest ; and the Debtor were to write, to the Creditor, that he sent him one fourth of the Debt, and one-fourth of the Interest: would the Debtor be authorized to apply the Money so sent to the extinction of the Interest, before he carried any part of it to the reduction of the capital ? The only question is, whether or not the Legatees are bound to receive the indulgence of the Court in the manner in which the Court was pleased to grant it, so as to leave three fourths only of the Capital due.

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Mr. *Bickersteth*, Mr. *Rose*, Mr. *Roupell*, and
Mr. *Boteler*, for the Legatees :

By the Will, the Legatees were entitled to have their Legacies paid, at a certain short, limited period after the death of the Testator : but, before they could be paid, certain claims upon the Testator's Assets arose, and in consequence of those claims, the Legatees could not have immediate payment ; but the Court, upon the Petition of the Legatees, ordered certain Sums to be set apart to answer those Claims, and then directed the payment in question to be made. Now a payment on account being to be made, in a case where Principal and Interest are due, is it not of the essence of justice, and according to the custom of all mankind, to attribute that payment, first, to the discharge of the Interest, and then to appropriate the remainder to the discharge of the Principal. All transactions of such a nature proceed upon this principle, that the person who receives Money is to apply it, first, to the discharge of that which is not productive to him, to compensate him for

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MONTGOMERY.

the delay which he has suffered. The object of the Petition was, that the aggregate amount of Principal and Interest should form one sum; and the Order proceeds in the same manner, and treats it as one sum. If the Court had not intended to apply the ordinary rule in such cases, the Order must have been expressed in totally different terms; for then it must have directed the *Master* to ascertain one-fourth of what was due to the Legatees, for Principal, and one-fourth of what was due to them, for Interest; and that one-fourth of the Principal, and one-fourth of the Interest should be paid. By the Order of May 1824, the *Master* was directed to take an account of what remained due to the Legatees, for the Principal only, of their Legacies. This shows that it was considered as quite clear that a portion of the Principal only, could remain due after the payment directed by the previous Order.—

[The *Vice-Chancellor*:—Was there any Legacy so constituted as that one fourth of the Principal and Interest of it would be less than the amount of the Interest?]

—No: and therefore the Legatees never could have had compound Interest; and the subsequent Order takes it for granted, that one fourth of the Principal and Interest exceeded the amount of the Interest; for it directs the *Master* to compute what was due for the remaining Principal Money.

The VICE-CHANCELLOR:—

The *Master*, in pursuance of the Order of August 1817, has made his Report, and taken an Account, so as to give, to the Legatees, the benefit of the Payments which had been made, by applying them, in the first instance, in discharge of the whole of the Interest, and

then in discharge of part of the Principal; and the question raised by the Exception is, whether this course of proceeding were right or wrong? Now it appears to me that, if the Court had ever meant that the Payment was to be made in any other manner than as the *Master* conceived, nothing was so easy as for the Court to express, in terms, that that should be the form of Payment. But the Court has used a phrase that appears inconsistent with that; for it has directed that the *Master* should certify the amount of one fourth of the Principal and Interest, and not one fourth of the Principal and one fourth of ~~the~~ Interest, that is, it directs only that one fourth of the gross Amount should be paid, and has left it to the Law to determine how the Payment should be applied.

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Now, it is admitted that the Assets are more than sufficient to pay the Principal and Interest of the Legacies. How then are the Residuary Legatees to be paid, until the pecuniary Legatees have received all that is due to them for Principal and Interest. And, without entering into the question of Law as to the pecuniary and residuary Legatees, it is sufficient to say that it is the peculiar privilege of the pecuniary Legatee to have his Legacy paid, if there be sufficient to do so; and, therefore, my opinion is, that the *Master's* Report, in this Case, should be confirmed, and that the Exception should be overruled.

1828 :
13th June.

Will.
Construction.
Vesting of
Portions.

Testator gave to his Widow a Life-interest in a Fund, with a Power of appointment, amongst all his Children living at her Death; and, in default of appointment, directed the Fund to be divided amongst all *such* children, with a Gift over to the Widow, in case all the Children died before their Shares became payable.

The Widow appointed the Fund to the two surviving Children; one of them died in her lifetime. Held that the only surviving Child took, upon the Widow's Death, the whole of the Fund.

BIELEFIELD v. RECORD.

JAMES RECORD made his Will, dated the 27th of October 1789, and which was, partly, as follows: "All my Copyhold and Leasehold Estates, and also all the rest and residue of my Estate and Effects, both Real and Personal, of what nature or kind soever the same may be or consist of at the time of my death, I give, devise and bequeath unto my Wife, *Mary Record*, *Richard Burton*, and *John Hayter*, or the Survivors or Survivor of them, their Heirs, Executors, Administrators and Assigns, in Trust to sell and dispose of the same, as soon as conveniently may be after my Decease, in such manner as my said Wife and the said *Richard Burton* and *John Hayter*, or the Survivors or Survivor of them, shall judge best; and then to put, place out and invest all the Monies arising therefrom (after payment of the Expense of such Sale) in their Names, in some of the Public Funds, or on Government or Parliamentary Securities, or on such other good Securities, at Interest, as my said Wife, and the said *Richard Burton* and *John Hayter*, or the Survivors or Survivor of them, shall think fit, upon the trusts and to and for the uses, intents and purposes hereinafter mentioned; that is to say, upon Trust to pay the yearly Interest, Dividends and Produce thereof unto my said Wife, or otherwise permit and suffer her to receive the same, for and during the term of her natural life; and, from and after her decease, upon Trust to pay and divide the whole unto and amongst all and every my Child or Children, as shall be living at the time of the death of my said Wife, in such parts and proportions,

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v.
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manner and form, as my said Wife, in her lifetime, shall, by any Deed or Instrument in Writing, or by her last Will and Testament, duly executed and attested, direct, limit, or appoint the same; and, in default thereof, then upon trust to pay and divide the same unto and amongst all and every such Child and Children, in equal parts and proportions, share and share alike, to such of them as shall be a Son or Sons, at his or their age or ages of twenty-one years, and to such of them as shall be a Daughter or Daughters, at her or their age or ages of twenty-one years, or day or days of Marriage, which shall first happen, provided such Marriage be with the consent of my said Trustees, or the Survivors or Survivor of them; and, in the mean time, I order and direct that the Interest of the respective Share or Shares of such Child or Children shall be paid or applied for and towards his, her, or their maintenance and education, until his, her, or their Share or Shares shall become payable as aforesaid: and I do hereby also authorize and empower my said Trustees, during the lifetime of my said Wife, provided the same be with her consent, and afterwards, to apply the respective Part or Share of any of my Children, or so much thereof as they shall judge necessary, in order to put and place out such Children to business, or any suitable employ, as may be thought best by my said Trustees; but in case it should happen that all my Children shall die before their Shares shall become payable by virtue of this my Will, then I give and bequeath the whole of the said Estates and Premises hereinbefore mentioned to be settled as aforesaid, unto my said wife *Mary Record*, her Heirs, Executors, Administrators, and Assigns. Provided nevertheless, and it is my express will and meaning that, in case my said

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 v.
 RECORD.

Wife shall marry or take any future Husband, that then and in that case I order and direct that the said Estates and Premises hereinbefore limited to her for her life as aforesaid, shall immediately go to and devolve upon my said Children, in such manner as the same would do in case she was naturally dead, and be paid and applied by my Trustees accordingly: and lastly, I do hereby nominate, constitute, and appoint my said Wife, *Mary Record*, together with the said *Richard Burton*, Executrix and Executor of this my Will, and also Guardians of my Children."

The Testator died in June 1795, leaving his Wife and four Children, namely, the defendant, *James Record*, and *Mary Bielefield*, and two others, who both died under age and unmarried. In July 1797, *Mary Record*, the Daughter, with the consent of the Trustees of her Father's Will, married the Defendant, *John Henry Bielefield*. In April 1798 she attained the age of twenty-one. By a Deed-Poll, dated the 30th of June 1823, Mrs. *Record*, in exercise of the power given by the Will, appointed part of the Property, the subject of it, to her Son *James Record*, and the remainder to her Daughter *Mary Bielefield*. In March 1827, Mrs. *Bielefield* died, and her Husband became her Administrator. Mrs. *Record* died in May 1828, having appointed the Plaintiff her Executor.

The Bill alleged that, according to the true construction of the Testator's Will, Mrs. *Record* had a power of appointment amongst such children only of the Testator as should survive her, and that, in default of her exercising the power, the trust-funds were divisible between such surviving Children; and that, as

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Mary Bielefeld died in the lifetime of *Mrs. Record*, she did not become entitled to any part of the property. Whereas the Defendant *J. H. Bielefeld* insisted that the appointment made by *Mrs. Record* was good and valid, or, at least, that, in default of appointment, the trust-funds were limited by the Will, so as to confer vested interests on the Children of the Testator, as to Sons at twenty-one, and as to Daughters at twenty-one, or marriage, with consent, although they might not survive *Mrs. Record*; and that *Mary Bielefeld*, therefore, did, by virtue of the appointment, become entitled to so much of the trust-premises as were thereby appointed to her, or that, if the appointment was invalid, she took a vested interest in a moiety of the whole. The Bill prayed that the true construction of the Will, and the validity of the appointment, and the rights and interests of all parties in the trust-funds, might be ascertained and declared by the Court.

Mr. Belt for the Plaintiff:

Mr. Sugden, and *Mr. Moore*, for the Defendant *James Record*:

The Testator's Widow might have appointed to any of the Children; but they must have been living at her death. Although the Children did not take vested interests, yet their maintenance and advancement were provided for out of their contingent interests. The cases that will be cited in support of the other Defendant's claim, have all depended on the question, whether the word "payable" was to be considered to mean "vested." There is not a single case in which that word has been considered as enlarging the preceding gift. As there was only one Child living at the Widow's

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death, the event in which the power was to be exercised did not arise.

Mr. *Treslove*, and Mr. *Chandless*, for the Defendant *John H. Bielefield*:

There is an inconsistency in supposing that the Children, who were the objects of the power, must be living at the death of the mother; for that power was to be exercised by Deed as well as by Will, and, according to the construction contended for by the other Defendant, an appointment made in the former manner might fail by the death of the Appointee in the lifetime of the Donee of the power. Several other provisions in the Will are inconsistent with the condition that the Child should be living at the death of the Widow, especially that which directs that, on the Widow's marrying again, the Children shall take immediately. This case comes within the rule laid down by Sir *W. Grant*, M. R. in *Howgrave v. Cartier* (a). *Woodcock v. Duke of Dorset* (b), and *Perfeet v. Lord Curzon* (c), are also in point.

The VICE-CHANCELLOR:—

I see no reason, in this case, why the word "payable" should not receive its ordinary meaning.

The Testator describes the objects of the power to be the Child or Children who should be living at the death of their Mother, and directs that, in default of appointment, the fund shall go unto and amongst all and every *such* Child or Children, that is, those who

(a) 3 V. & B. 79. (b) 3 Bro. C. C. 569.
(c) 5 Madd. 442.

should be living at her death. The proviso for the maintenance and advancement of the Children is also correctly expressed; for, during the Widow's life, any of the Children might be those who would survive the Wife. The gift over on the second marriage of the Widow, refers to all the Children, and not to those only who might be living at the death of the Widow.

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RECORD.

Declare the Defendant *James Record* to be entitled to the whole fund (d).

(d) See *Hotchkin v. Humfrey*, 2 Madd. 65.

TREFUSIS v. LORD CLINTON.

MR. *TINNEY* moved that a Purchaser, under the Decree of the Court, of a Reversion expectant on a Life-interest might, be ordered to pay interest on his Purchase-money from the time of his purchase.

Mr. *Lynch*, for the Purchaser, opposed the motion, and cited *Blount v. Blount* (a).

But the *Vice-Chancellor* ordered the Purchaser to pay interest from the time of his purchase.

(a) 8 Atk. 635.

1828.
24th July.
Vendor and
Purchaser.
Interest.
A Purchaser
of a Reversion
ordered to pay
Interest on his
Purchase-
money from the
time of the
Purchase.

1828:
19th June.

*Husband and
Wife.
Bankrupt.*

Husband and Wife made a post-nuptial Settlement in 1821, of Monies due to the Wife. The Monies were received by the Trustees, and invested in their Names. The Husband was a Trader, and had committed acts of Bankruptcy prior to the Settlement. In 1823 he was declared Bankrupt: held that his Assignees were entitled to the funds. The 6 Geo. 4, c. 16, s. 73, has no retrospective operation.

WOMBWELL v. LAVER (a).

WILLIAM COCKERTON, by his Will, gave to his Daughter, the Plaintiff, *Martha Wombwell*, then *Martha Cockerton*, spinster, a Legacy of 1,800 *l.*, and appointed his Son, *William Cockerton*, his Executor. The Legacy was not paid; and, on the 4th of May 1816, *William Cockerton* the Executor, executed a Bond to *Martha Cockerton*, in the penal Sum of 4,000 *l.* for securing payment of the 1,800 *l.*, with Interest at 5 *l.* per cent. By another Bond, dated the 9th of *January* 1821, one *William Weld Wren* became bound to *Martha Cockerton* in the penal Sum of 1,000 *l.* for securing 500 *l.* and Interest at five per cent. The Plaintiff was entitled to other Sums in the Funds.

In *November* 1821, the Plaintiff married *Walter Wombwell*, who possessed himself of all her Property, except the two Sums secured by the Bonds. No Settlement was made upon the Marriage, but, shortly afterwards, by an Indenture, dated the 4th of *December* 1821, and made between *Walter Wombwell*, of the first part, *Martha Wombwell*, of the second part, the Rev. *Miles Moor* and *Thomas Laver*, of the third part, reciting that the friends of the Plaintiff had interposed, and induced *W. Wombwell* to consent to a Settlement being made of the residue of the Sums of 1,800 *l.* and 500 *l.* upon his receiving, for his own use, 1,000 *l.*, part thereof:

(a) *Ex relatione* Mr. Bethell.

In consideration of the premises, and of the Marriage, *Walter Wombwell* and the Plaintiff, *Martha Wombwell*, assigned to *Miles Moor* and *Thomas Laver*, the two Bonds, and the principal Sums thereby secured, and the Interest thereon, upon trust to compel payment of the Sum of 1,000*l.* part of the Monies thereby assigned, and, on receipt thereof, to pay over the same to *Walter Wombwell*, his Executors, Administrators or Assigns, for his own use, and, subject thereto, upon the request in writing of the Plaintiff *Martha Wombwell*, during her life, notwithstanding her Coverture, and, after her decease, then at the discretion of the Trustees, to compel payment of the residue of the 1,800*l.* and 500*l.*, and to invest the same, in the names of the Trustees, in the Funds, or on Real Securities, and, in the mean time, and after the same should be so got in and invested, upon trust to pay over the Dividends or Interest into the hands of *Martha Wombwell*, during her life, for her separate use, and, after her decease, upon trust to pay the Dividends to *Walter Wombwell* or his Assigns, during his Life, and, after the decease of the Survivor, to pay and assign over the Sums of 800*l.* and 500*l.* or the Securities on which the same might be invested, to such persons as *Martha Wombwell*, by her Will, notwithstanding her Coverture, should appoint, and, in default of appointment, to assign the same unto the Child, if only one, and, if more than one, between all the Children of the Marriage.

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WOMBWELL
v.
LAVER.

Immediately upon the execution of this Indenture, *William Cockerton* paid 1,000*l.* in part of the Bond for 1,800*l.* to *Walter Wombwell*; and, in September 1822, the Sums of 800*l.* and 500*l.*, the remainder of what was due upon the two Bonds, were paid to the Trustees

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 WOMBWELL
 v.
 LAVER.

which, together with 6*l.* 10*s.* advanced by *Martha Wombwell*, were laid out in the Purchase of 1,300*l.* new 4 per Cents in the names of the Trustees.

Miles Moor died in the lifetime of *Thomas Laver*. In September 1823, a Commission of Bankrupt issued against *Walter Wombwell*, and the Defendant *Robert Steers* was chosen Assignee under the Commission. The Defendant *Steers* gave notice to *Laver*, the Trustee, not to pay any further Dividends to Mrs. *Wombwell*; and commenced an Action at Law against *Laver* for recovery of the Monies received by him and *Moor*, as Trustees of the Settlement, in respect of the Bonds. Upon this Action being commenced, *Martha Wombwell* and her Children filed the Bill in this Cause, against *Laver* and *Steers*, praying that the Settlement might be established, and the Defendant *Steers* be restrained from proceeding in his Action.

On the part of the Defendant *Steers*, several Witnesses were examined, who proved that *Wombwell* was a Trader at the time of his Marriage and of the Settlement, and that he had, previously to the date of the Settlement, committed many acts of bankruptcy.

Mr. *Pepys*, and Mr. *Wright*, for the Plaintiff, insisted that the Stock, the subject of the Settlement, could not be got at, except through the medium of a Court of Equity, and that, as the Money arose from a Legacy, for which the Bond was merely a Security, the Plaintiff *Martha Wombwell* was entitled to a Settlement. They relied on *Glaister v. Hewer* (b).

(b) 8 Ves. 195; 9 Ves. 12, and 11 Ves. 377.

Mr. *Bethell* for the Defendant *Steers* :—

At the date of the Settlement it was competent to the Husband to have brought an Action, in the joint names of himself and his Wife, to recover the Money due on the Bonds : and, inasmuch as the Settlement was a voluntary one, and made by a trader, and therefore fraudulent and void, by virtue of the 1st James 1, c. 15, s. 5, that right, as it then existed, passed to his Assignee. No retrospective operation can be attributed to the 73d section of the 6th Geo. 4, c. 16. The Court has no jurisdiction to interfere against the legal title of the Assignee, who is entitled to exercise that right which was vested in the Husband at the date of the Settlement. *Oswell v. Probert* (b); *Macaulay v. Philips* (c). In *Murray v. Lord Elibank* (d), Lord Eldon says : “ the Husband, where he can, is entitled to lay hold of his Wife’s Property, and this Court will not interfere.” *Bosvil v. Brander* (e).

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WOMBWELL
v.
LAVER.

The VICE-CHANCELLOR :—

As Mr. *Bethell* has observed, the 73rd section of 6 Geo. 4, c. 16, has no retrospective effect : and, in this case, the Commissioners had exercised their power, by executing a Bargain and Sale and Assignment, to the Assignees, prior to the passing of that Act of Parliament ; and, therefore, that Bargain and Sale and Assignment would pass, to the Assignees, all that they could have possessed under the then existing Law.

I confess that it appears to me in this Case (which must, undoubtedly, be governed according to the Law which existed prior to the passing of the recent Act of

(b) 2 Ves. jun. 680.

(c) 4 Ves. 15.

(d) 10 Ves. 84.

(e) 1 P. W. 458.

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which, together
Wombwell, &
new 4 per

My
In *the* *transaction* *which* *cannot*
the *Husband*, *by* *the* *Deed* *of*
Marriage, *professes* *to* *assign* *those*
given *to* *his* *Wife*; *and* *I* *take*
be *his* *Debts* *within* *the* *meaning*
of *James*—*Debts*, *upon* *which* *he* *might*
bring *an* *Action*, *in* *the* *joint* *names* *of* *him-*
self *and* *his* *Wife*, *and*, *by* *an* *Action*, *might* *have*
received *the* *Debts* *under* *a* *Judgment* *in* *the* *Action* *so*
brought *in* *the* *joint* *names* *of* *himself* *and* *Wife*. *My*
opinion, *therefore*, *is* *that* *this* *transaction* *cannot* *be*
supported.

In the Case of *Glaister v. Hewer*, it appears that the Husband had received the Wife's Fortune after Marriage, and that he laid it out in the names of himself and Wife; and, in that Case, The *Master of the Rolls*, first thought that the Wife had no interest in the Estate. But Lord *Eldon* expressed an opinion that that Case was not within the statute of James. Now in this Case, Persons who are named as Trustees in the Deed of December 1821, did, by the authority of the Husband, receive Money due upon the Bonds. They were, therefore, his Nominees; and, having received it, they received it, in my opinion, in point of Law, for the benefit of the Assignees.

COLLIS v. COLLIS.

THE Plaintiffs were the infant Children of the Defendants, *Henry Collis* and *Selina* his Wife.

At the time of their Marriage, *Selina Collis* was entitled to two sums of 2,000*l.* each; one of which was due from *Thomas Shackle*, upon a Mortgage; and the other, from *Thomas Rolfe*, upon a Bond, Warrant of Attorney, and Deposit of Deeds, with an Agreement for a Mortgage.

By the Settlement made upon the Marriage, these two sums were assigned to *Edward Shackle*, *Robert Fennell*, and *William Hinds*, upon trust to call in or to continue the same, or any part thereof, in the hands of *Thomas Shackle* and *Thomas Rolfe*, upon the then Securities, or upon any Real Securities they should think proper; and, upon the receipt of the two sums, to lay out the same in their names in the Public Funds, or upon Government or Real Securities; and to stand possessed of the Trust Monies and Securities, upon certain Trusts for the separate use of *Selina Collis*, for life, and, after her decease, either in the lifetime, or after the decease of *Henry Collis*, upon certain trusts for the Children of the Marriage. The Settlement contained a power to appoint new Trustees.

In December 1824, *Thomas Rolfe* executed, to the Trustees, a Mortgage for securing the payment of the 2,000*l.* due from him.

In May 1825, *Thomas Shackle* paid the 2,000*l.* due from him, to the Trustees, and that sum, with the

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Monies directed by a Settlement to be laid out in Government or Real Securities, were lent, by the Trustees, to the Husband, on Bond; the Trustees were ordered, on Motion, to pay the Sums into Court.

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Parliament) that this was a transaction which cannot be supported ; because the Husband, by the Deed of 1821, after the Marriage, professes to assign those Funds which had been given to his Wife ; and I take it that they would be his Debts within the meaning of the statute of James—Debts, upon which he might have brought an Action, in the joint names of himself and his Wife, and, by an Action, might have realized the Debts under a Judgment in the Action so brought in the joint names of himself and Wife. My opinion, therefore, is that this transaction cannot be supported.

In the Case of *Glaister v. Hewer*, it appears that the Husband had received the Wife's Fortune after Marriage, and that he laid it out in the names of himself and Wife ; and, in that Case, The *Master of the Rolls*, first thought that the Wife had no interest in the Estate. But Lord *Eldon* expressed an opinion that that Case was not within the statute of James. Now in this Case, Persons who are named as Trustees in the Deed of December 1821, did, by the authority of the Husband, receive Money due upon the Bonds. They were, therefore, his Nominees ; and, having received it, they received it, in my opinion, in point of Law, for the benefit of the Assignees.

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THE Plaintiffs were the infant Children of the Defendants, *Henry Collis* and *Selina* his Wife.

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consent of *Henry Collis* and his Wife, was laid out in the purchase of 2,231 *l.* 10*s.* 5*d.* three per cent. Consols, in the names of the Trustees.

By a Deed Poll, dated the 25th of June 1825, the Trustees, in pursuance of the power in the Settlement, appointed the Defendants, *Charles Collis*, *Matthias Dupont King*, and *Henry King*, to be Trustees of the Settlement in their stead.

In July 1825, the 2,231 *l.* 10*s.* 5*d.* three per cent. Consols were sold, at the request of *Henry Collis* and his Wife, and the Monies produced by the sale were advanced to *Henry Collis*, by way of loan, upon his personal Security only.

About April 1826, *Thomas Rolfe* paid, to the old Trustees, the 2,000 *l.* due from him; and they, on the 7th April 1826, paid that sum into the hands of the Defendant *Matthias Dupont King*, on behalf of himself and the other Defendants, *Charles Collis* and *Henry King*.

Henry Collis was a trader. The object of the Suit was to compel an investment of the Trust Monies, upon proper Securities.

The Defendant *Matthias Dupont King*, by his Answer, admitted the receipt of the 2,000 *l.* originally due from *Thomas Rolfe*, and that he had lent it to the Defendant *Henry Collis*, upon his personal Security, in the first instance; but that he had since obtained other Securities for that Sum, which were not immediately available, but that the Monies were not in hazard, and

that he intended to invest the same upon Government or Real Securities as soon as he could recover the same from the Defendant. *Henry Collis*, or his Effects. The Answer of the same Defendant, with respect to the sum of 2000*l.* originally due from *Thomas Shackle*, was to the same effect. The Answers of the Defendants *Charles Collis* and *Henry Collis*, with respect to the 2000*l.* originally due from *Thomas Shackle*, were to the same effect as the Answer of the Defendant *M. D. King*; but, with respect to the 2,000*l.* due from *Thomas Rolfe*, they said that they believed that the Defendant *M. D. King* had received that sum, and applied it to his own use, although requested by *Selina Collis* to invest it upon proper Securities.

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The Defendant, *Henry King*, by his Answer, said that the two Sums had been lent to *Henry Collis*, upon his personal Security, but did not admit that he was a Party to the transactions.

A Motion was now made for the Plaintiffs, that the Defendants, or some or one of them, might be ordered to pay the two Sums of 2,000 *l.* into Court.

Mr. *Wigram* for the Motion:—

1. The admissions in the Answers would entitle the Plaintiffs to a Decree at the hearing of the Cause. 2. In the case of a breach of trust, where the Title of the Plaintiffs is not disputed, they are entitled, upon such admissions, to have the Money brought into Court upon Motion. The principle is, that the admission of the Trustees that they have received the Money, makes them liable upon

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Motion; and then the effect of that admission cannot be got rid of in any other way than by showing a proper application of it. *Beaumont v. Meredith* (a), *Vigrass v. Binfield* (b), *Rothwell v. Rothwell* (c).

Mr. Sugden, and Mr. Sclater, for *M. D. King* and *Henry King*.

Mr. Moore, for *H. Collis* and wife.

Mr. Duckworth, for *Charles Collis*.

The Vice-Chancellor ordered that *Matthias D. King* should, on or before the 4th day of November next, pay, into Court, the Sum of 2,000 *l.*, originally due from *Thomas Rolfe*, and that the Defendants *Henry Collis*, *Charles Collis*, and *M. D. King* should, on or before the same day, pay, into Court, the Sum of 2,000 *l.* originally due from *Thomas Shackle*.

(a) 3 Ves. & Beam. 180. (b) 3 Madd. 62.

(c) 2 Sim. & Stu. 217.

LONG v. YONGE.*

THE Bill was filed, by forty-seven persons, on behalf of themselves, and all other the Members of and Partners in *The Norwich Equitable Insurance Company*, against the Survivors of the original Directors and Trustees of the Company, and certain other Members of the Company who had been appointed by them in the room of the deceased Directors and Trustees, and also against the Executors of the late Secretary or Registrar. It stated that, in 1807, a Company was instituted, at *Norwich*, called: "*The Norwich Equitable Insurance Company*," for the purpose of effecting Insurances on Goods and Buildings from Fire, and that it was established and declared that the Society or Company should be, and the same was, accordingly, so constituted as to form a Partnership between the existing Members for the time being: That, upon the formation of the Society, and on the 29th of September 1807, a Deed was executed, by the persons who at that time constituted the Society or Company, by the 1st Article of which it was provided that all persons subscribing the Deed, or who should be allowed to insure in the Society, and their respective Executors, Administrators, and Assigns, being allowed to be and continue as persons insuring in the Society, should be deemed Members thereof, and be concluded by the Covenants and Agreements therein

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30th April &
1st May.

*Joint Stock
Company.
Pleading.
Parties.*

Some of the Members of a Partnership cannot file a Bill, on behalf of themselves and the others, for a dissolution of the Partnership: but all the Members, however numerous, must be Parties to the Suit.

* As an important question was decided in this Case, which was discussed in *Blain v. Agar*, ante, 289, and in other Cases that have been lately reported, it was thought advisable to give an early Report of it.

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contained, and should have their proportionable Share of the Profits arising by the same, during the terms of their respective Policies. By the 2d Article, nine persons, some of whom were since dead, and others were Defendants to the Bill, were appointed Trustees of the Company; and, in their names, all the Monies, Purchases and Securities of the Society, were to be invested and taken; and the power of electing new Trustees, in the room of those who should die, resign, or misconduct themselves, was vested in the surviving or continuing Trustees. By the third Article, twelve persons, some of whom also were since dead and others were Defendants, were appointed Directors of the Company, and were empowered to accept or reject Insurances, and to direct the making and giving out of Policies, and to sign the same; and, in case of vacancies occurring in the Directorship, they were to be supplied by Members chosen by the Trustees. By the fourth Article, *John Steward*, since deceased, was appointed Secretary or Registrar of the Company; and was to have the custody of the Books and Accounts of the Company, and all Premiums and other Payments were to be paid to him; and he was to accept Insurances, and sign and deliver Policies, either solely, or jointly with any Director, or two Directors; and, in case of his office becoming vacant, the Trustees were to fill up the vacancy. By the fifth Article, the Trustees were to appoint three Members to be Auditors of the Accounts of the Company; and the Balance in the Registrar's hands was to be paid to the Treasurer. By the ninth Article, all Insurances, granted by the Company, were to continue for any length of time, for which any three of the Directors and the Registrar should consent, and continue to receive the Premiums; and no Insurer was to be entitled to any Dividends or Shares of the

profits of the Company, until the expiration of five years after the date of his Policy. By the thirteenth Article, it was provided that, at the expiration of every five years after any Policy should be granted, there should be returned or paid, to the Insurers, a proportionable dividend of the premiums, and of the profits and savings in the mean time made of the same, after deducting losses and incidental charges. By the fifteenth Article, it was provided that, if any Member should assign his Policy, or should die, the Assignor, or the Executors or Administrators of the deceased Member, should, within three calendar months, give notice thereof to the Registrar, and bring his Policy to the office of the Registrar, to the end that such assignment or death might be indorsed on it, and signed by the Registrar, and entered in the books of the office ; and in default thereof, that the benefit of the Policy should be forfeited : and that, in case the Directors or Registrar should not allow the Assignee, or Executors or Administrators, to remain as Insurers, he or they should be entitled to such sum only as should be then payable on the Policy, and that the same should thenceforth be null and void. By the eighteenth Article it was declared that, if the Directors and Registrar should think fit to discontinue the Insurances of any Member, it should be lawful for them to cause the Policies of such Member to be cancelled, on giving fourteen days notice of their intention, and paying to such Member his proportion of the premiums, and of the profits due on his Policies, and that all questions relating thereto should be decided by a majority of the Directors. By the nineteenth Article, the Directors and Trustees were empowered, by giving fourteen days notice, to call a general meeting of the Members, at which any

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matters relating to the Company were to be considered of and determined, and, thirty Members at least, being present, whose Insurances should amount, collectively, to 25,000*l.* and upwards, to alter, amend, and add to the Articles.

The Bill further stated that, upon the execution of the Deed, the Trustees, Directors, and Registrar entered upon their respective offices; and that, from time to time, Policies were issued to various Persons, who, thereupon became Members of, and Partners in, the Company. The Bill then mentioned the times at which certain of the Plaintiffs were admitted as Insurers and Partners in the Company, comprising a period commencing with the year 1807, and terminating with the year 1823; and that those Plaintiffs, upon being admitted as Insurers, became Members of and Partners in the Company, together with the other existing Members, and entitled, with them, to the Stock, Capital, and Profits in equal Shares: That, since the death of *John Steward*, the Plaintiffs had discovered that the Business of the Company had been greatly mismanaged by the Persons who had assumed the conduct thereof: That one of the Trustees died in 1808, and others in 1814, 1820, and 1827: That one of the original Directors died in 1810, and others in 1814, 1824, and 1827: That each of the vacancies ought to have been immediately filled up by the Trustees for the time being, so that there might be, at all times, nine Trustees and twelve Directors; but that no new Trustee or Director had been appointed until December 1829: That the Trustees and Directors had, for many Years before *Steward's* decease, neglected their duty, and left the entire management of the Affairs of the Company

to *Steward*: That the Accounts of the Company had not been audited, nor any reports of the Affairs thereof made, for several Years before *Steward's* death: That he had taken upon himself to nominate certain Persons to act as Directors; but that those Persons had, for some time, ceased to act as Directors; but that, whilst they had acted as such, (which was from 1824 down to 1829), certain of the Plaintiffs had become Insurers and Partners, and that their Policies had been signed by *John Steward*, and also by some of the Persons so appointed by him, the last of such Policies having been effected and signed in 1829: That the last-mentioned Plaintiffs, upon becoming Insurers, had become Partners of and Members in the Company: That, in October 1829, *John Steward* died, having appointed the Defendants *John Henry Steward*, *George William Steward*, *Thomas Boston Wilkinson*, and *Edward Steward*, his Executors: That *John Steward* died largely indebted to the Company; and that, upon his decease, the office of Registrar became vacant, and that the then surviving original Trustees and Directors having, for many years, neglected the Management of the Company, there was no Person to represent it, or to superintend the Business, which was, in consequence, suspended: That, by reason of the neglect of the Trustees to appoint a new Trustee as often as any vacancy occurred, the remaining Trustees became incompetent to fill up the vacancies in their Body, or to appoint a new Secretary or Registrar: That, on the 31st of December 1829, a general Meeting was held, and attended by a large number of Members, whose Policies amounted to 150,000*l.*, when it was unanimously resolved that it was expedient to dissolve the Society; and that, on the 4th of March 1830, a Notice

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of Dissolution was signed by twelve of the Members; and, on the 6th of the same Month, it was left at the Office of the Company, and delivered to the surviving original Trustees and Directors, and also was inserted in the Newspapers published in *Norwich* and *Ipswich*: That, notwithstanding the Partnership or Company had become dissolved as aforesaid, the three Survivors of the original Trustees had taken upon themselves to appoint six Persons (who were also Defendants to the Bill), to be new Trustees in the room of the original Trustees who had died; and that those nine Trustees had appointed six Persons (who were also Defendants to the Bill), to be Directors in the room of the six original Directors who had died; and that the last-mentioned Trustees had appointed the Defendant *Edward Steward*, to be the new Secretary and Registrar. The Bill charged that the new Appointments had not been made according to the Deed, and that, under the circumstances aforesaid, the Business of the Company could not be carried on in the manner directed by the Deed, and that it had become and was absolutely dissolved. The Bill then charged that the Persons who held Policies in the Company exceeded four thousand; and that, therefore, it would be impracticable to make them all Parties to the Suit: that a large proportion of them, to the number of several thousands, resided in various parts of the Kingdom, at a distance from the County of *Norfolk*, and that the Plaintiffs were ignorant of, and had no means of ascertaining, the names and residences of such last-mentioned Partners.

The Bill prayed that it might be declared that, under the circumstances aforesaid, and by reason of the neglect

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of the Trustees to execute their duties, and particularly to keep up the number of the Trustees, the Business of the Company or Partnership could not be carried on according to the directions of the Deed, and that the Company or Partnership had become and was dissolved: That accounts might be taken of the Stock and Effects of the Partnership, and that its Concerns might be wound up, and the surplus Effects be divided amongst the Members; and that an account might be taken of *John Steward's* Receipts and Payments, on account of the Company; and that the balance found due might be paid, by his Executors, out of his assets; and that the Trustees, Directors and Registrar, might be restrained from doing any act under colour of their respective pretended offices.

The Defendants demurred to the Bill for want of equity, and because all the Partners in the Company had not been made parties; and because several persons who appeared, by the Bill, to have acted as Directors, had not been made Parties to the Suit.

The *Solicitor General*, Mr. *Pepys*, and Mr. *Turner*, for the Defendants, in support of the Demurrer:

The principal question is, whether the Plaintiffs are entitled to file this Bill without having all the Partners before the Court. The Parties are mutual Insurers, and the Society is, to all intents and purposes, a Partnership. But it stands upon quite a different footing from a Partnership for an unlimited period. Every time that a new Insurance is made, there is a new Contract entered into. It is, therefore, a Partnership, which is to continue until the expiration of every Insurance, that is to say, for 4,000 different periods. Forty-seven of the

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Partners cannot, by themselves, put an end to the Partnership ; nor can that act be done, except with the concurrence of the whole Body.

This is a Case in which the Court cannot proceed in the absence of any of the Parties interested. How can the account of a Partner, with the Company, be taken in his absence ? Where a common benefit is to be enforced, or where the act required to be done, is one from which none of the others can withdraw, the Court will allow some to sue on behalf of themselves and others : but where the Court is required to act against the interest of any of the Parties, it cannot proceed unless all the Parties are on the record. The consequence of granting the prayer of this Bill will be to cancel the Policies of 4,000 individuals in the absence of them all, except the few who are upon the Record. It may not be for the common benefit, nor is there any thing to show that it is the wish of the Body, that the Partnership should be put an end to.

By the terms of the Deed, none but the Trustees and Directors can call a general meeting ; and such a meeting could be convened for the purpose only of continuing, and not of putting an end to the Partnership. The general meeting, therefore, that was called, acted against the Articles of Partnership.

The Plaintiffs have conflicting interests. The Bill contends that, after the death of the Trustee who died in 1808, no valid Insurances could be made. Three only of the Plaintiffs are holders of Policies granted before his death ; and the Policies of others were signed by the Directors who were appointed by *Steward* ;

therefore, conflicting claims must arise between the prior Partners and those to whom Policies were granted by the Directors who were irregularly appointed. Forty-four of the Plaintiffs have no claims against the Defendants, but have adverse claims against the three other Plaintiffs.

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By the Deed, no Insurer is to be entitled to any share of the profits until five years after the effecting of his Insurance. Ten or twelve of the Plaintiffs have effected Insurances within the last five years, and therefore they have interests inconsistent with those of the other Plaintiffs whose policies have been effected upwards of five years. *Cholmondeley v. Clinton* (a) decided that persons having conflicting claims could not be joined as Co-plaintiffs.

The Bill is filed by the Plaintiffs, on behalf of themselves and all the other Partners. Now the Defendants are Partners in the Company ; they are, therefore, both Plaintiffs and Defendants.

It will be said, for the Plaintiffs, that the Partnership has been dissolved by the Notice ; but that Notice has not been served on all the Partners. Besides, this Partnership was not capable of being dissolved. The Bill does not pray that it may be put an end to, but only that the acts stated may be considered as a Dissolution. The Partnership, therefore, is still subsisting ; and, for that reason, the Court will not exercise jurisdiction over its Affairs.

If the Assets are not sufficient to pay the demands

(a) See 2 Jac. & Walk. 191.

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upon the Partnership, how can the Court compel Contribution from Persons who are not Parties, to the Suit? Suppose that one of the Partners who is not a Party has been overpaid, how could the Court compel him to refund? No Decree can be made upon the Trustees to pay any Share of the Profits to the personal Representatives of any of the deceased Partners, as they are not before the Court.

The deceased Trustees were answerable, with the Survivors, for their acts; but their Representatives are not Parties to the Bill. *Waters v. Taylor* (b); *Forman v. Homfray* (c); *Beaumont v. Meredith* (d); *Weale v. West Middlesex Waterworks Company* (e); *Blain v. Agar* (f); *Van Sandau v. Moore* (g); *Davis v. Fisk* (h).

Sir C. Wetherell, Mr. Treslove, and Mr. Roupell,
for the Plaintiffs, in support of the Bill:

The Case of *Van Sandau v. Moore* has no bearing upon the present Question. The Decision in that Case was, that more Persons ought to have been made Parties to the Bill; not that all the Shareholders must be made Parties (i), but that there must be Persons on the Record to represent the Company. There is no

(b) 15 Ves. 10.

(c) 1 J. & W. 358.

(c) 2 V. & B. 329.

(f) 1 Vol. 37, & *ante*, 289.

(d) 3 V. & B. 180.

(g) 1 Russ. 441.

(h) Gow, on Partnership, 113, and Farren on Life Assurance, 128.

(i) This observation, it is presumed, relates to the decision upon the demurrer in the Case referred to. The Judgment reported by Mr. Russell contains a *dictum* only of Lord Eldon upon the point: The plaintiff, however, made all the Shareholders defendants to his second Bill.

passage, in the Report of that Case, in which Lord *Eldon* says, if *Van Sandau's* condition had been that of a Member of the Company, suing on behalf of himself and all others, against the Defendants, that all the Members of the Institution must have been made Parties.

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The argument for the Defendants goes to this extent, that if events have happened which form a clear and admitted Case for a Dissolution under the Articles, no one Partner can file a Bill for a dissolution, and to have the Concerns wound up, without making all the other Partners Parties to the Suit. Suppose that the Articles had required that all Policies should be signed by seven Directors, and that, by death or retirement, that body had been reduced to three, and, consequently, no valid Policies could afterwards be granted, and the Partnership would be dissolved in Law; can it be said that a Court of Equity could grant no relief unless all the four thousand Insurers were made either Plaintiffs or Defendants to the Suit? Creditors and Legatees are permitted to sue on behalf of themselves and others. So, a Lord of a Manor may file a Bill, against some of his Tenants, or a Rector, against some of his Parishioners, to establish a custom (*k*). In short, any general Right whatever may be established, either by one suing for the Body, against the Individual who resists the claim, or by the Individual who claims the Right, against some of the Parties who resist the claim. *Good v. Blewitt* (*l*); *Lloyd v. Loaring* (*m*); *Chancey v. May* (*n*); *Adair v. The New River Company* (*o*). In this last Case Lord *Eldon* states the practice of the Court upon the

(*k*) See the *Duke of Norfolk v. Myers*, 4 Madd. 83.

(*l*) 13 Ves. 397.

(*n*) Prec. Chan. 592.

(*m*) 6 Ves. 773.

(*o*) 11 Ves. 429.

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subject in discussion, to be directly opposite to what he is made to represent it in *Van Sandau v. Moore. Cockburn v. Thompson* (p).

[The *Vice-Chancellor*:—This Case differs from all those that you have cited, because you raise a question as to the Rights which the absent Partners have, and can those rights be decided in their absence? In *Cockburn v. Thompson*, the Bill was filed to make *Thompson* account for the Sums he had received. It was, in effect, a Suit against him alone; and the question was whether he could be heard to say that the Society should not proceed against him unless all the Members were made Parties. If the question had been *bonâ fide* raised, whether the Partnership should be dissolved or not, and some Members of the Society had been made Defendants, who insisted that it should not be dissolved, then the question that arises in this Case would have been raised in that; but there is no resemblance between the two.]

The objection as to want of Parties is answered by the charge in the Bill, as to the impracticability of making all the Insurers Parties, and the charge is interrogated to, in the usual manner, for the purpose of obtaining, from the Defendants, a discovery of the particulars of which the Plaintiffs allege that they are ignorant. The charge referred to takes this Case out of the general rule, and puts an end to the Demurrer for want of Parties. In the common case of an Heir at Law, who is a necessary party to a Suit, it is usual for the Plaintiff to allege that he does not know who is the Heir, and to call upon the Defendant to say who he is.

(p) 16 Ves. 321.

[The *Vice-Chancellor* :—In a Case where there is no connection between the Plaintiff and the person who is stated to have died, it is allowable to state that the Plaintiff does not know, and has no means of learning, who the Heir at Law is. But here a Case is stated in which it is possible to ascertain who the other Parties are; because the Policies could not be kept on foot without a knowledge of the Parties. If you had stated that there was a book preserved by the Officers, in which the names and residences of all the Insurers were inserted, and that you had applied to them for an inspection of that book, or a copy of its contents, which they had refused to give, that would have been a very different case. But here the Plaintiffs state, merely, that they are ignorant of the names and residences of several of the Partners; and the question is, whether that can be considered as a sufficient excuse for not making those persons Parties *.]

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Next, as to the Demurrer for want of Equity. Events have happened which have either dissolved the Partnership, or rendered it impossible to be carried on according to the Terms of the Deed. In either Case we

* The Bill did contain a charge that the Defendants had in their custody the original Partnership Deed, and various other writings relating to the matters aforesaid, and, in particular, those that contained Lists of the Policies granted by the Company, and of the names and residences of the holders of them; and that the Plaintiffs had not in their custody or power any writings containing any list or account of the Policies, or of the names of the persons forming the Company; and that the Defendants refused to permit the Plaintiffs to inspect or take copies of such writings; and that the Plaintiffs were therefore ignorant of the names of the persons forming the Company. This charge, however, does not appear to have been adverted to.

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have a right to come to the Court and say that, if it is dissolved by Law, we claim to have its Affairs wound up, and the Property distributed; but if it is not dissolved by Law, we have a right to call upon the Court to dissolve it. By the Deed there was to be a certain number of Trustees and Directors, and a Secretary appointed in a certain manner. Every one of these provisions has been violated, and cannot now be carried into effect. It is of no importance whether the Plaintiffs say that the Partnership cannot be carried on according to the Deed, and that the Law has put an end to it, or that they have a right to come into a Court of Equity and say that they will no longer be bound by the acts of Officers who have been appointed in violation of the Terms of the Deed. The Deed provides that there shall be always nine Trustees and twelve Directors. Only three of the former and five of the latter are now living; and many acts have been done by these defective bodies. On Mr. *Steward's* death, there was no power competent to appoint a new Secretary; and the duties of that office are such that, without a Secretary duly appointed, the business of the Partnership cannot be carried on. The Plaintiffs are competent to dissolve the Partnership, and have given the notice required for that purpose: the Court is, therefore, authorized to declare that the Partnership is duly dissolved. It is impossible to maintain that persons can be bound to go on with a Partnership to be regulated by four Trustees and five Directors, where the Deed prescribes that it shall be managed by a greater number of each.

If the Plaintiffs are not entitled to have the Partner-

ship dissolved, they are entitled, at least, to the Injunction (q).

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[The *Vice-Chancellor*: An Injunction to restrain the Trustees from acting would be virtually a Dissolution. Every person taking a Policy makes himself a Partner, and places himself in a situation to have Policies granted to other Persons, which may be beneficial to him. He may say, therefore, that, in his absence, those who may be Trustees and Directors ought not to be restrained from acting in those capacities.]

We do not dispute that a Case may be put in which it would be beneficial to go on with the Partnership, but we contend that we have a right to say that those Trustees and Directors are not to carry on the Partnership, and that it is dissolved. No Policies that have been granted since the vacancies have occurred in the Boards of Directors and Trustees are valid.

[The *Vice-Chancellor*: The way in which you argue the Case appears to me to show the propriety of having all the Persons interested, Parties to the Suit. The frame of the Bill is such that you cannot proceed one step without calling in question the characters of the Persons who, *primâ facie*, ought to be parties. There-

(q) In *Davis v. Fisk*, which has been before referred to, Lord Eldon, C., is reported to have said, "It must not be understood, from what I am about to say, that I give any opinion whether the Plaintiffs might or might not put such a case on the record as would entitle them to a decree for the relief they seek. The question is, whether, on an interlocutory motion, I can do what is asked. If I could not grant the decree as asked, I cannot grant the Injunction."

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fore the Case now before me seems to differ from all those that you have alluded to, because the Bill raises a question whether those persons, who are not Parties to the Record, have Rights which, *primâ facie*, they appear to be entitled to claim. And the Court is asked to determine, in their absence, whether they are entitled to the Rights of Partners.]

The Plaintiffs are competent to raise and sustain the rights of those Partners who are absent. Although the Policies that have been irregularly issued, may be bad at Law, yet this Court may render them effectual, because the holders of them are not to be charged with the default of the Trustees and Directors in not filling up the vacancies. For the purpose of the Decree, it is not necessary that all the Partners should be Parties. The Court may direct all Persons to go before the *Master*, who will determine whether their Policies are binding either at Law or in Equity. According to the view that the Counsel for the Defendants take of the Case, the Directors may go on indefinitely granting Policies which cannot be enforced in a Court of Law, and from which no benefit can be derived. None of the Assignments of Policies that have been made since the death of Mr. *Steward*, are valid, because there has been no valid appointment of a Registrar or Secretary to supply his place, and, therefore, no Policy can have been indorsed in the manner required, by the Deed, to give validity to the assignment of it. If there be no Registrar duly appointed, no Policy can be cancelled; and, therefore, the Society has not the benefit of the protection which is given to it by the 18th Article; nor can a Dissolution be obtained, as has been contended, under that Article.

The Counsel for the Plaintiffs were proceeding to observe upon the other Objections to the Bill; but The *Vice-Chancellor* intimated that his opinion was so strong upon the question of Parties, that it was unnecessary to argue any of the other points; and thereupon the Counsel for the Defendants waved the other Objections.

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The VICE-CHANCELLOR:—

It appeared to me that it was not at all necessary to enter into the question as to the want of Equity, when there was one decisive objection for want of Parties; an objection, in fact, of such a nature, that, if it was allowed, it is quite obvious that the Suit must perish.

Now the Rules with respect to Parties are exceedingly plain and intelligible to those who will consider the principle on which they are founded. The general rule is that all Parties interested in the subject of the Suit, shall be Parties to the Record. Then there are certain Exceptions. And those Exceptions, as far as this particular point is concerned, may be divided into two parts. One Exception is, where several Persons having distinct Rights against a common Fund, or against one Individual, are allowed, a few of them, on behalf of themselves and the rest, to file a Bill for the purpose of prosecuting their mutual Rights against the common Fund, or the Individual liable to their demand. The other Exception is, where a Person may have a Right against several Individuals, who are liable to common obligations. In that case, a Bill is allowed to be filed, by a single Plaintiff, against some, but not all, of those Persons who are bound to make good the Plaintiff's demand. This is the general division of the Exceptions to the general Rule.

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Then we have to consider whether this Case falls within either of those Exceptions.

If, in this Case, the Bill had been filed by some of the Members of the Society, against an Individual upon whom the whole Society had a demand, it is perfectly clear that he could not have made an objection that all the Members were not Parties; and the rule, laid down by *Lord Eldon*, in the Cases of *Cockburn v. Thompson*, and *Adair v. The New River Company*, would have obviously applied. But the very nature and object of this Suit is to deprive Persons who are not Parties on the Record, of that Right, which, upon the face of the Bill, they at present possess; and it appears to me that this Case is as distinct, from the two that I have mentioned, as a Case can be, and that it is precisely governed by the principle upon which *Lord Eldon* allowed the Demurrer to the first Bill filed by Mr. *Van Sandau*. By that Bill, which Mr. *Van Sandau* filed against certain Members of *The British Annuity Company*, he prayed: "That the Company, and the Defendants on behalf of the Company, might be restrained from doing any act to deprive him of his Share, or from acting on the Deed of Settlement." It might be perfectly true that he had a good Case to show that the Deed of Settlement, which had been executed, was not a proper Deed of Settlement. Then all the Members of the Company had acceded to the Deed of Settlement. He, therefore, by his Bill against some of the Members, asked, not only to deprive them, but others, who were extremely numerous, of the benefits they were entitled to. On the objection being made, for want of Parties, *Lord Eldon* allowed it.

I have very little to do with the observations made upon the second part of the Case, because it arises on the second Bill, in which all the Shareholders had been made Parties. It is only observable, with respect to what did take place on the subject of the second Bill, that Lord *Eldon* says, " I have not forgotten that, in the course of the Argument, Mr. *Van Sandau* stated that, when he got the Answers of some of the Defendants, he could amend the Bill, by making it a Bill on behalf of himself and others of the Partners, except such of them as he should retain as Defendants." Then Lord *Eldon* adds, " But, in my judgment, that cannot be done." The consequence, therefore, was, that Lord *Eldon* did, in effect, pronounce, in the second Suit, the same Opinion as he had pronounced in the first Suit, when he allowed the Demurrer to the first Bill for want of Parties. Then the Case of *Davis v. Fisk*, and the other Cases that have been alluded to, from *Chancey v. May* down to the present time, show to me, most distinctly, that, if this Bill asks to deprive 4,000 Persons of their present Rights, the Plaintiffs ought not to be at liberty to stir in the Case, until they have made every one of those Individuals Parties. That is my clear Opinion, and I have no doubt whatever about it; and I think, therefore, that the Demurrer must be allowed, and the Costs must follow in the usual way.

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1828 :
25th July.

*Judgment-
Creditor.
Equity.*

A Receiver appointed in a Suit instituted by Incumbrancers was ordered to keep down the Incumbrances out of the Rents, and to pay the residue to the owner of the Estate. A Judgment Creditor may file a Bill against the owner and Receiver, without making the other incumbrancers parties, to have his Debt satisfied out of the surplus Rents.

LEWIS v. LORD ZOUCHE.

THE Bill (which was filed on the 28th of June 1828,) stated that the Plaintiff had lately obtained a Judgment in the Court of King's Bench, against the Defendant, Lord *Zouche*, for 1,229 *l.*, and had, thereupon, issued an *Elegit*, directed to the Sheriff of *Sussex*, commanding him to deliver to the Plaintiff all the Goods and Chattels of the Defendant in his Bailiwick; and also a moiety of all the Lands and Tenements in his Bailiwick, whereof the Defendant, or any Person or Persons in Trust for him, on the 12th of June, in the 9th Year of his present Majesty, (on which day the Judgment was given,) or ever afterwards, was seised: To hold, &c.: that the Writ was returnable on the 22d of June 1828; That the Plaintiff had, lately, obtained another Judgment, in the same Court, against the same Defendant, for 220 *l.* 10 *s.*, and had issued an *Elegit* thereon, returnable on the same day: That the Sheriff had returned, on both Writs, that the Defendant had not any Goods and Chattels in his Bailiwick which he could cause to be delivered to the Plaintiff, nor had he, or any Person or Persons in trust for him, on the 12th of June, in the 9th Year, &c., or at any time since, any Lands or Tenements in his Bailiwick, which he could cause to be delivered to the Plaintiff: That Lord *Zouche*, being seised of or well entitled unto several Manors, Messuages, &c. in the County of *Sussex*, for his Life, subject to several Incumbrances, by an Order of the Court of Chancery, dated the 23d of May 1822, made in a Cause wherein *Nicholas Winckley* was Plaintiff,

and Lord *Zouche* and *Harriet Anne* his Wife, *Thomas Rhoades*, *Joseph Rose* and *Robert Curzon*, and *Harriet Anne* his Wife, were Defendants, it was referred, to one of the Masters of the Court, to inquire and state to the Court, the several Incumbrances affecting the Real Estates of Lord *Zouche*, in the County of *Sussex*; and also to state their Priorities, and to appoint a Receiver of those Estates: That, on the 9th of July 1820, the *Master* appointed the Defendant, *John Rose* to be such Receiver: That, on the 19th of March 1823, the *Master*, after stating the Title*, reported the Incumbrances to be Annuities payable to Lady *Zouche*, Mrs. *Curzon*, *Nicholas Winckley*, *Thomas Rhoades*, *Joseph Rose*, and some other Persons, and stated their Priorities: That, on the 8th of July 1824, the Report was confirmed, and the Receiver was ordered to pay the Annuities, according to their Priorities, out of the Rents of the Estates, and to pay the Residue of those Rents to Lord *Zouche*, until the further order of the Court: That Lord *Zouche* had parted with the Legal Estate in the Hereditaments: That, if all the Annuities were subsisting, there would be a clear Annual Residue of the Rents amounting to 3,873 *l.*; but that some of the Annuities had ceased since the *Master* made his Report: and that there was, then, a clear Annual Residue of the Rents, amounting to 5,073 *l.*, after paying the subsisting Charges. The Bill prayed that the Receiver might be ordered to pay, to the Plaintiff, the Principal, and Interest due on his two Judgments, after keeping down the Charges; and that the Receiver might be restrained from paying, to Lord *Zouche*, and that Lord *Zouche*

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LEWIS

v.

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* The nature of Lord *Zouche's* title did not appear upon the Bill otherwise than as is here stated.

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might be restrained from receiving any of the Rents until the Plaintiff should have been paid his Principal and Interest.

Lord *Zouche*, and *John Rose*, the other Defendant, demurred to the Bill, for want of Equity; and because *Nicholas Winckley*, Lady *Zouche*, *Thomas Rhoades*, *Joseph Rose*, and *Robert Curzon*, and *Harriet Anne* his Wife, were not Parties to it, although it appeared, by the Plaintiff's own showing, that they ought to have been made Parties.

The Demurrer came on to be heard at the same time as a Motion, made by the Plaintiff, for an Injunction as prayed by the Bill, or that the Receiver might be ordered, after keeping down the Incumbrances, to pay, either to the Plaintiff, or into Court, the Money secured by the Judgments, and the Residue of the Rents to Lord *Zouche*.

Mr. *Barber*, and Mr. *Lynch*, in support of the Demurrer:

This is a Bill *primæ impressionis*. A Judgment Creditor has no right to apply to this Court, except to remove legal impediments. It would be a very strong measure to make an order that he should be paid out of the Rents, and for an Injunction. *Bennet v. Box* (b). *Prat v. Colt* (c). [Mr. *Sugden*, for the Plaintiff:—Those cases were decided before the Statute of Frauds.] The Statute of Frauds, certainly, does allow an Equitable Estate to be taken in Execution, but then

(b) Ca. Cha. 12.

(c) Ca. Cha. 128. S. C. 2 Freeman, 139.

it must be a Trust for the Debtor (*d*). The Sheriff has returned that Lord *Zouche* had no Lands in his Bailiwick; and this Estate not being a subject of Execution at Law, is not a subject of Execution in Equity. The point was not expressly decided in *Lord Dillon v. Plaskett* (*e*). In that Case there was no Demurrer; and, therefore, the Parties submitted to the Jurisdiction of the Court; and there was no other Suit pending. Besides, there was 5,000*l.* a year to be paid to Lord *Dillon*: but Lord *Zouche* is not entitled to receive any definite Sum.

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There are other fatal objections to this Suit. The Bill states the pendency of another Suit; and that the Court has taken possession of the Estates in that Suit. There cannot be two Suits by Creditors. If this Bill is sustained, and there are twenty Judgments against Lord *Zouche*, every one of the Creditors may file a new Bill, and call on the Receiver to hand over the Rents and Profits to him. The Plaintiff might have had the benefit of the former Suit, by obtaining an Order, in it, that he might go in and be examined *pro interesse suo*; and he might have got the Injunction under that Order. The surplus, after paying the Charges and the Receiver's Poundage, is to be paid over to Lord *Zouche*; and, therefore, it is the subject-matter of Account in the other Suit. At all events, if this Bill is to be sustained, all the Parties to that Suit must be Parties to this Suit also; as they have a right to be present at the taking of the Accounts which are necessary for the purpose of ascertaining the Residue.

(*d*) *Harris v. Pugh*, 4 Bing. 335.

(*e*) 2 Bligh's New Series, 239.

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 ———
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If these Arguments apply to the Case of Lord *Zouche*, they may be urged, with still greater force, with respect to Mr. *Rose*. He is only a Receiver; and the Bill seeks to restrain him from doing what he has been ordered to do in the former Suit. Suppose that he had been made a Party to thirty Suits; how is he to be paid his Costs? Has he a preferable Lien for them to that of the Creditors? If he has, they ought all to be made Parties to the Suit.

Mr. *Sugden*, and Mr. *Moore*, for the Plaintiff, in support of the Bill, were stopped by the Court.

The VICE-CHANCELLOR :—

By the Order in the Cause of *Winckley v. Lord Zouche*, the Receiver was directed to pay certain Sums, out of the Rents and Profits of his Lordship's Estates in *Sussex*, to certain Persons, and the Residue of those Rents was to be paid to Lord *Zouche*. He, therefore, is the Owner of those Estates, except so far as a Court of Equity has rendered it impossible for any person to deal with them; and he has an Interest in them, for he is entitled to the Residue of the Rents.

It has been said that this Bill has been improperly filed, because the Plaintiff might have come in and been examined *pro interesse suo*, in the former Suit. That may be true as applied to the same Fund; and, perhaps, he might have done so in this case; but that does not deprive him of the Right to file a Bill to have his Judgment satisfied.

Then it is said that the object of the Bill is incongruous with the Order in the first Suit. But it appears

to me that that is not so ; for the Bill is filed on the footing of that Order. Next, it is objected that Lord *Zouche* is not seised either in Law or in Equity : but my opinion is, that he is seised entirely in Equity ; and that, but for the Officer of the Court, he would have a Right to the possession of the Estates.

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The next objection is, that there is a defect of Parties. But it would have been improper to make the prior Creditors Parties to this Suit, as their Rights are not sought to be affected by it. Mr. *Rose* is in possession of the Estates ; and if he were not a Party to the Suit I could not make any Order upon him. Upon the whole, therefore, it seems to me that there is not the least ground for either of the Demurrers.

Demurrers overruled.

The Order made upon the Motion, was that the Receiver, after keeping down the Incumbrances, should, out of the Rents, pay into Court the Sums secured by the Judgments, and that he should be restrained from paying, and Lord *Zouche* from receiving any part, of the Rents until such Payment should be made, or until the further Order of the Court.

GREEN v. GREEN.*

1828:
2d August.

Practice.

Three Defendants were ordered to deliver up possession of estates to the Receiver, within a certain time, or to stand committed: but no writ of Execution of the order was served on them. The Defendants having refused to obey the order, the Serjeant-at-Arms was ordered to go against them. On the Defendants being brought up in custody, it appeared that one of them was an Infant, and he and another of them expressing contrition, were ordered to be discharged on payment of Costs; the third persisting in his Contempt, was committed. The two others remained in custody, being unable to pay their Costs. A Motion afterwards made, by the Defendants, to discharge the orders of commitment, for Irregularity, was granted.

THOMAS GREEN, by his Will, dated the 3d of August 1805, gave his Real and Personal Estates to his Sons, *Joseph Green* and *William Green*, their Heirs, Executors, Administrators and Assigns; and directed them to pay, thereout, 850*l.* unto his younger Sons, the Plaintiffs, *Thomas Green*, *John Green*, and *Edward Green*; and appointed *William Green* and *Joseph Green* his Executors. *William Green* died in December 1812, leaving the Defendant *Joseph Green* his eldest Son and Heir-at-Law, and the Defendant *Mary Green* his Widow and Administratrix. *Joseph Green*, the other Executor, died in April 1816, having by his Will, dated in February 1816, given his Real and Personal Estates to the Defendants *Illingworth* and *Roberts*, upon certain Trusts. In October 1820 a Suit was instituted by the Legatees, for the purpose of having the Will of *Thomas Green* established, and the Trusts thereof carried into execution. On the 3d of December 1825, a Decree was made, which, after establishing the Will, and directing the execution of the Trusts, and the usual Accounts to be taken, ordered that, in case the Personal Estate should be insufficient for the payment of the Testator's Debts and Legacies, then that

* The Editor was compelled, by indisposition, to be absent from Court when this case was argued. He is indebted to his friend, Mr. E. F. Moore, for the above Report.

a sufficient part of the Real Estates should be sold for payment thereof.

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On the 14th of March 1826, an Order was obtained by the Plaintiffs for the appointment of a Receiver of *Thomas Green's* Real Estates, which directed that the Tenants of such Estates should attorn and pay their Rents to such Receiver, and that such parts as were then in the possession of any of the Defendants should be delivered up to such Receiver.

In pursuance of this Order, a Receiver was appointed.

It appeared that three of the Defendants, namely, *Thomas Green*, *Joseph Green*, and *George Green*, (who were the Sons of *Joseph Green* the surviving Executor of the Testator *Thomas Green*,) were in the possession of a certain Messuage and Dwelling-house in *Wakefield*, in the county of *York*, part of the Real Estates of the Testator. A Notice was, accordingly, given to them, on the 22d March 1828, by the Receiver, which recited the Order under which he had been appointed, and required them to deliver up to him immediate possession of such parts of the real estates as were then in their possession.

To this Notice no attention was paid by these Defendants, who refused either to attorn to the Receiver, or to give up Possession of the Premises. On the 6th June 1828, a Motion was made for the committal of these Defendants to the Fleet Prison, for a contempt, in refusing to attorn, or deliver up, to the Receiver, Possession of "*certain Premises*," part of the Estates in question, and then in the occupation of the Defendants. Upon this motion an Order was made, by The Vice-

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Chancellor, whereby the three Defendants were directed to deliver up Possession of the Premises to the Receiver, within a week from the date thereof, or, in default, to stand committed to the Fleet Prison.

The time limited by this Order was, subsequently, enlarged to the 10th of July following, by an Order made on the 20th of June 1828. No Writ of execution of this or either of the previous Orders was taken out. On the 17th July 1828, it appearing that, on service of the last Order on the Defendants and Possession being demanded, they still refused to deliver up Possession of the Premises, the Serjeant-at-Arms was ordered to go against them.

The Defendants being brought to the Bar of the Court in the custody of the Serjeant-at-Arms, Mr. *Cooper* moved for their commitment to the Fleet, upon a statement of the previous facts, and their continued contumacy. It then appeared that *George Green* was an Infant.

Upon the Court admonishing the Defendants on their Contempt, *John* and *George Green* expressed their contrition, and willingness to give up Possession of the Premises as far as was in their power, and they were thereupon ordered to be discharged out of the custody of the Serjeant-at-Arms, upon payment of the Costs incurred by their Contempt. *Thomas Green*, the other Defendant, still persisting in his Contempt, and expressing his determination to retain Possession of the Premises, having at that moment the key of them in his pocket, was committed to the Fleet. The Costs not being paid by the two other Defendants, they remained still in the custody of the Serjeant-at-Arms.

A Motion was now made to discharge the Orders of the 20th June and 17th July, for irregularity, and that the warrants, issued against the Defendants under the last-mentioned Order, might be set aside, and the Defendants discharged out of custody touching their alleged Contempt, and that the Costs of and occasioned by the application might be paid, by the Plaintiffs, to the Defendants.

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Mr. *Agar*, and Mr. *Knight*, for the Motion :

The proceedings in this Case are wholly irregular. Several persons cannot be included in one Notice, they being alleged guilty of several contempts. If process go against them, they cannot be relieved from the process until each has cleared his separate Contempt. This would be a manifest injustice.

The Parties here are distinct, and have no interest in common : the Notices should have been given to them individually. Two of the Defendants, in their Affidavit, swear that they have no interest or claim whatever in the Property in question, and reside only with their Brother as boarders, one inhabiting a bed-room only, being employed in the business of an upholsterer in another part of the Town, and the other living with his Brother, and assisting him in his Business in the capacity of a servant; and they both positively swear that, although they boarded and lodged with *Thomas Green*, they have no right or claim to any part of the Property in question, and that they have never, in their lives, had any control over it.

One of the Defendants is an Infant. His commitment must be irregular.

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The principle of the Court is never to interfere with the personal liberty of the subject, where there are other means within its power for obtaining that which it seeks. If the signature to an Instrument is necessary, that, being the act of the party, can only be enforced by personal restraint.

Where the object has been to put a Party in possession of Property, if the Court can obtain that by its own proceedings, there is no authority for putting the person in prison. The Court cannot proceed in both ways at the same time.

The Notice given by the Receiver, on the 22d of March, requiring the Defendants to deliver up immediate possession of the Premises, was improper. A Receiver is not authorized, by the practice of the Court, to require an individual to give up immediate and instantaneous possession of Property, which he believes himself, at the time, to be holding legally, having inherited it from his Ancestors. The notice given previously to the Motion for the commitment of the Defendants for the alleged Contempt, was informal. It merely required that "certain Premises" should be given up, without giving the slightest description of what those Premises were. It was impossible for the Defendants to know, from the terms of the Notice, what the Premises were of which it was required that they should give Possession. No Notice was given, to the Defendants, that the Court would be moved to commit them provided they did not deliver up Possession within a certain time. But a Notice was served, informing them that, on a certain day, a Motion would be made for their commitment,

for not having delivered up possession. They were not bound to regard any of these Notices.

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The apprehension of the Defendants by a Serjeant-at-Arms, was both illegal and irregular.

The VICE-CHANCELLOR :—

[After consulting with the Registrar.] Where the persons are Parties in the Cause, I understand it is the practice that a Serjeant-at-Arms should go against them ; otherwise, if they are not Parties.]

The question is not material. In this case the whole proceedings are improper. There is not a single case in support of the course pursued here. The practice has been contrary for the space of 200 years. It is first pointed out by Lord *Bacon*, in his Ninth Order, where it is directed : “That in case of a Decree, made for the Possession of Land, a Writ of Execution goeth forth ; and, if that be disobeyed, then process of Contempt, according to the course of the Court, against the Person, to commission of Rebellion, and then a Serjeant-at-Arms, by special Warrant, and in case the Serjeant-at-Arms cannot find him, or be resisted, upon the coming in of the Party, and his commitment, if he persist in disobedience, an injunction is to be granted for the possession ; and in case that also be disobeyed, then a Commission to put him in possession (a).”

The same course of proceedings is laid down in *Tothill*, 44. In *Stribley v. Hawkie* (b), it was decided that, after a Writ of Execution of a Decree, and an Attachment served on the Defendant, the Plaintiff may have an injunction

(a) Beames's Orders, 6.

(b) 3 Atk. 275.

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to deliver Possession, and then a Writ of Assistance to the sheriff, commanding him to be aiding and assisting in putting the Party in possession. *Edwards v. Pool* (c) is to the same effect. There a Commission of Rebellion was refused, on special motion, it being a process which, if warranted by the previous process, issues of course. In that case, after process run out to a sequestration, the Tenant in possession refused to deliver up Possession; and Mr. *Dickens* states the practice to be for the Court, upon the Certificate of the Sequestrator, to grant an Order to enjoin him to deliver Possession to the Sequestrator, and that, upon service of the Order and disobedience, an Attachment issues of course (which is not to be executed), and that, upon this, the Court will order a Writ of Assistance to put the Sequestrator into possession: and he cites two cases where orders to that effect were made by Lord *Hardwicke*. In *Dove v. Dove* (d) a Writ of Assistance was granted upon affidavit of Service of the Injunction, and disobedience to it. There the whole process was run out. And, in Mr. *Dickens's* Report of this case, all the previous Authorities on this point are collected. It appears that, from the earliest Records of this Court, the Practice has been uniform and unvaried.

Whenever there is an Order, there must be a Writ of Execution. This is the first process after the order for delivering up possession of the premises; and in this case it is specially directed by Lord *Bacon's* Order. Here the committal is obtained immediately on the breach of the Order, no Writ of Execution having been moved for.

(c) 2 Dick. 693.

(d) 2 Dick. 617. S. C. 1 Bro. C. C. 375; and 1 Cox, 101.

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The case of *Ferguson v. Tadman* (c) is precisely in point. There an Order was made, on the 25th of June 1819, for the appointment of a Receiver, and the Defendants were ordered to deliver, to the person to be appointed Receiver, the Premises in their possession. No time was limited. On the 27th of August 1819, an Order was made that service of a Writ of Execution of the Order of the 25th of June, on their Clerk in Court, should be deemed good service. The Writ was served accordingly. On the 5th of November following an application was made, that the Plaintiffs might be at liberty to sue out a Writ of Assistance; whereupon the Court ordered that the Receiver should give a week's notice, to the Defendants, of his having been appointed Receiver, and that he would attend, on a day to be named in such notice, to demand and receive Possession of the Premises in the occupation of the Defendants, pursuant to the Order of the 25th of June, and that service on the Defendants' Clerk in Court, should be deemed good service. On the 14th of December an Order was made, that the Plaintiffs' Clerk in Court should be at liberty to issue an Attachment against the Defendants for not obeying the Order of the 25th of June. On the 18th of the same month an Attachment issued, but the Court directed that it should not be executed; and, on the same day, an Order was made, for a Writ of Injunction for the Defendants to deliver Possession of the Premises within a week from the service of the Writ; and on the 15th of January 1820 a Writ of Assistance was granted, directed to the Sheriff, to put the Receiver into Possession of the Premises.

(c) Cited from a MS. note furnished by the Registrar. See post 410.

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In *Saunders v. Saunders* (f) a Decree was made on the 15th February 1822, by which the estates in question were directed to be sold. *Edward Wigan* having become the Purchaser of part of the Estates, and the Purchase Money having been ordered to be paid into Court, an Order was made, on the 5th of November 1823, on the application of the Purchaser, that *Elizabeth Saunders*, who was in Possession of the Premises, should deliver up Possession to the Purchaser. This Order was not proceeded on; but, on the 28th May 1824, an Order was made, on the application of the Plaintiff, that the Defendant, *Elizabeth Saunders*, should deliver Possession of the Estates to *Edward Wigan*, the Purchaser, within fifteen days. The Defendant was served with a Writ of Execution of this Order on the same day. An Attachment was granted against the Defendant, on the 18th of June following, for not obeying the Writ of Execution; and, on the 7th of July, a Writ of Injunction was issued; but Possession not having been delivered up, a Writ of Assistance was ordered on the 22d of the same month. This case is decisive of the point, unless there be a difference between the case of a Purchaser and a Receiver. The case of *Ferguson v. Tadman*, shows that no such distinction exists; for that was the case of a Receiver.

The Writ of Injunction is obtained on Motion of course, and is the only ground for the Writ of Assistance. *Huguenin v. Baseley* (g). After service of the Writ of Injunction, and disobedience of it, then a Writ

(f) Cited from a MS. note furnished by the Registrar. See post. 408.

(g) 15 Ves. 180.

of Assistance must be moved for; and not a Motion made to commit for Contempt of the order. This has been the uniform practice from the time of Lord *Bacon* down to the present time.

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Mr. *Sugden*, and Mr. *Cooper*, opposed the Motion.

I. There was no occasion to proceed against these Defendants separately. Here are three Brothers in joint possession, living together in the same house, and all claiming an Interest in the property, and acting, all along, in concert together. No objection is made, by either of them, when taken in Execution, for want of personal notice. If there had been any informality in not serving them, individually, with notice, they have waved it by their acquiescence.

This is no improper interference with the Liberty of the Subject: the Parties were in Contempt. In the case of an Injunction, on breach of it, the Court commits immediately. There is no delay on account of the Liberty of the Subject. Whenever a Party appears in Court, and acknowledges a Contempt of an Order of the Court, the Court will commit for breach of its Order. *Tothill*, 33; *Wyatt's Prac. Reg.* 137.

If the Process is irregular, the Defendant must clear his Contempt before he can set it aside. *Vowles v. Young* (h); *Anon* (i); *Harrison's Ch. Prac.* 160; *Ed.* 1808.

The Parties must obey the original Order before they can question the Process. It is no objection that one

(h) 9 Ves. 172.

(i) 15 Ves. 174.

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of the Defendants is a Minor. An Infant may be committed for Contempt. Tothill, 108. *Re Beech* (k). The Order of the 14th of March, directing a Receiver to be appointed to whom the Defendants were to at-torn, cannot be resisted. This is a material consideration, for the Defendants' refusal to deliver up Possession of the Premises in question, in pursuance of that Order, was a substantial Contempt.

II. We admit Lord *Bacon's* Order to be in force. The practice there laid down, and since followed in the cases cited, does not supersede that which we have adopted. There were two courses open for us. The Order is part of the Decree. An Attachment is the next Process under Lord *Bacon's* Order, then an Injunction, and then a Writ of Assistance. We moved to commit, in the first instance, for breach of the Decree. The practice we adopted has these advantages: it is less expensive, and more expeditious. There are numerous instances where Persons have been committed for not obeying the Decrees of this Court. A case is reported in Tothill, 40, of the committal of a Husband and Wife, for refusing to concur in the Sale of a Lease. In *Manly v. Eyton* (l), a Tenant was ordered to stand committed for non-payment of rent, without a day being given. In *The Attorney General v. The Mayor of Coventry* (m), the Mayor was committed for not obeying an Order. *Skip v. Harwood* (n); *Lansdown v. Elderton* (o); *Wilkins v. Stevens* (p); and Harrison's Ch. Prac. 475, and 333.

(k) 4 Mad. 128.

(n) 3 Atk. 564.

(l) 1 Dick. 183.

(o) 14 Ves. 512.

(m) 2 Dick. 781.

(p) 19 Ves. 117.

The VICE-CHANCELLOR:—

This is an application to discharge the two Orders of the 20th of June and 17th of July, for irregularity, and to liberate the Persons in custody for Contempt of those Orders.

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The passage from Lord *Bacon's* Order applies to the case where there has been a Decree. The cases of *Ferguson v. Tadman*, *Saunders v. Saunders*, and *Dove v. Dove*, are in point with that Order.

The Case now before the Court is where a Receiver has been appointed, and is exactly parrallel to *Ferguson v. Tadman*. There the steps taken were in conformity to Lord *Bacon's* Order. The Plaintiffs have produced no authority for the propriety of the practice they have adopted. There is a material distinction between an Order to do, and an Order to restrain from doing, a particular act. The same difference exists where the thing sought is possession, or the doing a particular act. The case of *Ferguson v. Tadman* exemplifies this principle. I think the Order of the 20th of June is wrong; but it is not necessary to decide that. It was not stated, on obtaining that Order, that *George Green* was an Infant; that was incorrect. The Order of the 20th of June, not being complied with, that of the 17th of July is obtained. No Writ of Execution appears to have been taken out. The practice is, that, when an Order is obtained and acted upon, it must appear that a Writ of Execution has been taken out. The Orders of the 20th of June and the 17th of July are therefore wrong. The first Order was wrong, as not complying with the established practice; and the second was

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wrong, because it was founded upon the first, and the Court had no notice of one of the Parties being an Infant. When the Parties were produced before me, I did not think myself authorized to interfere with the execution of the Orders.

The Orders must be discharged, the Persons liberated, and the Party obtaining the Orders must pay the costs (q).

The *Vice-Chancellor* was furnished, by Mr. *Bedwell*, the Registrar, with the following Extracts, from Reg. Lib. relative to the course of proceeding against a Party for not delivering up Possession of Estates.

Stribley v.
Hawkey.

Decree dated 6th July 1742. Reg. Lib. B. 1741, fo. 349, Defendant *Hawkey* ordered to convey the Premises in his Possession, and deliver Deeds to the Plaintiff.

7th June 1744, Reg. Lib. B. 1743, fo. 406; Defendant *Hawkey* ordered to deliver Possession to Plaintiff, pursuant to Decree, and the Tenants to attorn to the Plaintiff, unless the Defendant should on a day thereby appointed show good cause to the contrary.

30th June 1744, Reg. Lib. B. 1743, fo. 433; the last Order made absolute. The Defendant *Hawkey* was served with a Writ of Execution of the Order of the 30th June 1744.

(q) See post, 430.

6th November 1744, Reg. Lib. B. 1744, fo. 3; an Attachment directed to the Sheriff of *Cornwall*, against the Defendant *Hawkey*, for not delivering Possession.

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28th November 1744, Reg. Lib. B. 1774, fo. 23; Order for an Injunction against Defendant *Hawkey* to deliver Possession.

It is stated, in this Order, that the Sheriff returned a *cepi corpus* upon the Attachment, therefore it must have been executed; but it does not appear, by the entry of any Order, that the Defendant applied to the Court to discharge it.

18th December 1744, Reg. Lib. B. 1744, fo. 43; Order for a Writ of Assistance directed to the Sheriff of *Cornwall*, to put Plaintiff into Possession.

Decree dated the 20th of May 1772, Reg. Lib. B. 1771, May v. *Flook*, fo. 480; Decree, for Defendant, *Flook*, to deliver Possession to Plaintiff of the Estates of the Testator.

The Defendant *Flook* was served with a Writ of Execution of the Decree, and not obeying it, an Attachment issued against him, which was executed, and he was taken into custody.

28th June 1773, Reg. Lib. B. 1772, fo. 342; Defendant ordered to be discharged out of Custody, with Costs of the Application and of the Attachment, to be taxed by the *Master* if the Parties differed; and a Writ of Injunction ordered for Defendant *Flook* to deliver Possession, to the Plaintiff, pursuant to the Decree.

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6th July 1773, Reg. Lib. B. 1772, fo. 358; Order for a writ of Assistance, directed to the Sheriff, to put Plaintiff into Possession.

3d February 1774, Reg. Lib. B. 1773, fo. 132; The Defendant brought an Action for Assault and Imprisonment. The Court, upon the Plaintiff this day applying to stay the proceedings, and submitting to make the Defendant *Flook* such satisfaction for his Imprisonment on the Attachment, as should be approved of by the *Master*, ordered that it should be referred to the *Master*, to consider what would be a reasonable satisfaction to the Defendant in respect thereof, and ordered the Plaintiff to pay the same to the Defendant *Flook*, together with the Costs directed by the former Order of the 28th day of June 1773.

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Reg. Lib. B. 1821, fo. 721, Decree dated 15th February 1822. The Estates were directed to be sold, with the approbation of the *Master*, wherein all proper Parties were to join as the *Master* should direct.

The Estates were sold, and *Edward Wigan* became the Purchaser.

Reg. Lib. B. 1822, fo. 1635; Order dated the 25th of July 1823, for *Edward Wigan* to pay in his Purchase-money, and to be let into Possession.

The Defendant, *Elizabeth Saunders*, refused to deliver Possession to the Purchaser, *Edward Wigan*.

5th November 1823, Reg. Lib. B. 1822, fo. 1911; On the application of *Edward Wigan*, the Purchaser,

Order for Defendant, *Elizabeth Saunders*, to deliver Possession of the Estate to him. This Order, on the application of the Purchaser, was considered wrong, and was not proceeded upon.

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Reg. Lib. B. 1823, fo. 1024, 28th of May 1824 ; Order made on the application of the Plaintiffs that the Defendant, *Elizabeth Saunders*, should deliver Possession of the Estate to *Edward Wigan*, the Purchaser, within fifteen days.

The Defendant, *Elizabeth Saunders*, was served with a writ of Execution of the Order of the 28th May 1824.

18th June 1824.—Reg. Lib. B. 1823, fo. 1196; an Attachment against the Defendant, *Elizabeth Saunders*, directed to the Sheriff, for not obeying the Writ of Execution.

7th July 1824.—Reg. Lib. B. 1823, fo. 1231; on the application of the Plaintiffs; Order for a Writ of Injunction against Defendant to deliver Possession to *Edward Wigan*, the Purchaser.

15th July 1824.—Reg. Lib. B. 1822, fo. 1291; Order that service of the Writ of Injunction at the Defendant's dwelling-house should be deemed good service on the Defendant, *Elizabeth Saunders*.

22d July 1824.—Reg. Lib. B. 1823, fo. 1336; on the application of the Plaintiffs for a Writ of Assistance, directed to the Sheriff of *Staffordshire*, to put *Edward Wigan* into Possession, it was ordered accordingly.

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25th June 1819.—Reg. Lib. A. 1818, fo. 1809; Order for the appointment of a Receiver, and the Defendants to deliver, to the person to be appointed Receiver, the Premises in their possession. Not any time limited.

27th August 1819.—Reg. Lib. A. 1818, fo. 1833; ordered that service of a Writ of Execution of the Order, dated the 25th day of June 1819, on the Clerk in Court of the Defendants, should be deemed good service on the Defendants.

5th November 1819.—Reg. Lib. A. 1818, fo. 2080; Order made, upon application of Plaintiffs, that they might be at liberty to sue out a Writ of Assistance. The Court ordered that the Receiver should give a week's Notice, to the Defendants, of his having been appointed Receiver; and that he would attend, on a day to be named in such Notice, to demand and receive possession of the Premises in the possession or occupation of the Defendants, pursuant to the Order, dated the 25th June 1818; and that service of such Notice on the Defendants' Clerk in Court, should be deemed good service on the Defendants.

14th December 1819.—Reg. Lib. A. 1819, fo. 130; Order for the Plaintiffs' Clerk in Court to be at liberty to issue an Attachment against the Defendants, for not obeying the Order of the 25th of June 1819.

16th December 1819.—Reg. Lib. A. 1819, fo. 186; an Attachment directed to the Sheriff of Kent against the Defendants, for breach of the Writ of Execution of the Order dated 25th June 1819.

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18th December 1819.—Reg. Lib. A. 1819, fo. 169;
Order for a Writ of Injunction for the Defendants to deliver Possession to the Receiver, and that service upon the Defendants' Clerk in Court should be deemed good service on the Defendants.

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15th January 1820.—Reg. Lib. A. 1819, fo. 228;
Order for a Writ of Assistance, directed to the Sheriff of Kent, to put the Receiver into Possession of the Premises.

THE CORPORATION OF TRINITY HOUSE v. BURGE.

19 November:

*Defendant.
Plea.
Penalties.*

THE Bill stated that, under certain Letters Patent and Acts of Parliament, the Plaintiffs were, and, for a very great number of years last past, had been seised in fee of the Lastage and Ballastage, and Office of Lastage and Ballastage, of all Ships and Vessels which sail, pass and repass in the River *Thames*, or elsewhere, between London Bridge and the main Sea, eastward, and the exclusive Right of supplying of Ballast to all such Ships and Vessels: That the Defendant, in contravention of the Plaintiffs' Rights, had, between the 11th of February and 21st of April 1827, supplied a great number of Ships or Vessels, sailing as aforesaid, with large quantities of Ballast.

If a Defendant pleads that giving the Discovery sought by the Bill will subject him to Penalties, but between the filing and the hearing of the Plea, the time for suing for the Penalties expires, the Plea will be over-ruled.

The Bill charged that the Defendant ought to set forth an account of the quantity of Ballast which had been

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so sold or supplied by him during the last-mentioned period, and of all the sums of money received by him in respect thereof.

The Bill then prayed for a discovery of the several matters therein alleged, and for an account of the ballast which had been sold or supplied by the Defendant as before mentioned, and that he might be decreed to pay to the Plaintiffs what should be found due from him, and be restrained from supplying with Ballast any Ships or Vessels sailing as aforesaid.

To the Discovery sought by the Bill, the Defendant pleaded the 45th Geo. 3, c. 98, by which it was enacted : " That every person not duly authorized by the Corporation of the Trinity House, who should supply, with Ballast, any Ship or Vessel between London Bridge and the main Sea, should, for every ton of Ballast so supplied, forfeit the sum of 10 l." But, under this Act of Parliament, no Penalty could be recovered, unless it was sued for before the expiration of twelve months from the time when it was incurred ; and that period expired before the Plea was heard, but after it was filed.

Mr. *Wigram*, for the Plaintiffs :—

The circumstances under which this Case comes before the Court are unusual. The Plea, which goes to the Discovery only, was good at the time it was pleaded, because, at that time, the Answer of the Defendant might have subjected him to the Penalties of the Act of Parliament : but the time limited by the Act of Parliament having expired, the reason upon which the Plea is

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founded, fails the Defendant now. This is not the only peculiarity in the Case. In ordinary Cases, the Court, upon argument of a Plea, decides the Case with reference to the form and substance only of the Plea. If the Plea, though good in form and substance as pleaded, should, from any extrinsic circumstances, be bad, the Plaintiffs, in an ulterior proceeding, may take the Opinion of the Court upon that Point also (*a*). Now, in this Case, the Court is bound judicially to know, *at this time*, that the Plea, with reference to the Facts of the Case, is bad. There is no reason, therefore, why the Court should not now give that judgment which the Form, the Substance, and the Truth of the Plea together call for. There are, however, the strongest reasons why the Judgment of the Court should not be postponed; for, at no other time can the Plaintiffs have any benefit from the Judgment of the Court in their favour. This is not a Plea in bar of the Suit, or in abatement of the Suit. It is a Plea to the Plaintiffs' Evidence; and, if the final Judgment of the Court be not given till the hearing of the Cause, it will come too late to assist the Plaintiffs. It may be said that the Court, at the hearing of the Cause, might order the Defendant to be examined upon Interrogatories, as in the case of a Plea to the relief which is found false at the hearing. It must be admitted that the Court might do so; but as, in this Case, there is no subject for Inquiry; there is no reason why the delay and expense of such a course should be permitted. There is no objection to answering the Bill at this stage of the Cause, which would not equally apply to answering Interrogatories in a later stage. If, therefore, the Defendant is to answer at all,

(*a*) Mitf. 243, 244.

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he should, if not as a matter of right, at least as a measure of convenience, answer now.

In this Case it is admitted that the Plea was good, both in form and in substance, at the time it was pleaded; but the reason upon which it proceeds has ceased to exist. The Question, therefore, is, whether the Court is compelled to found its Judgment upon the Case as it stood at the time of the Plea pleaded, or whether it is not at liberty to decide it upon the Case as it stands at the time the Judgment of the Court is pronounced. In *Grene v. Gascoigne* (b), the report of the Case is in these Words: "In Debt on Bond of 100*l* the Defendant pleaded in bar to the Action, Outlawry in the Plaintiff, and showed it in certain. The Plaintiff replied, *Nul tiel Record*: upon which the Defendant had a day until the next Term to bring in the Record; and, in the mean time, the Plaintiff reversed the Outlawry, whereby it is now become in law *Nul tiel Record*: according to 4 H. 7, 12. *Yelverton* moved the Court, for the Defendants, that although this is in law a failure of Record, yet the Defendant ought not to be condemned, but a *respondeat ouster* shall be awarded: according to 6th Eliz. Dyer, 228. a., who puts the Case, that the failure of the Record is not peremptory: and so *adjudged per Curiam*; for, in fact, there is no default in the Defendant, his Plea being true at the time of pleading it." *Ison v. Gray* (c), and Co. Litt. 127. b., are to the same effect. These cases show that the truth of a Plea at the time it is pleaded, does not deprive the Court of the power to decide upon it with reference to the facts of the Case as they stand at the time its Judgment

(b) *Yelverton*, 36.(c) *Cro. Jac.* 484.

ment is given, where the justice and convenience of the Case require that it should be so decided. In this Case the time limited by the Act of Parliament for the recovery of Penalties, has expired; no new proceeding, therefore, can be instituted. It is not pretended that any Proceeding is now depending, and there is no principle upon which the Court, in favour of the Pleader, can intend that such is the case. The Defendant has had the full benefit of his Plea, and there is now no reason why it should remain on record to the Plaintiffs' prejudice. If the Plea should be allowed, the Plaintiffs must either dismiss their Bill, and file a new Bill in the very same Words, to which the Defendant must answer; or else the Plaintiffs must examine from 50 to 100 Witnesses to prove their Case, the whole Costs of which must ultimately fall upon the Defendant. The course, therefore, which the justice and convenience of the Case alike require, is that the Plea should be overruled, with liberty to the Defendant to make such new Defence as he may be advised to make.

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The precise point which arises in this case upon a Plea, was decided, in the case of *Williams v. Farrington (d)*, upon Exceptions to an Answer. It was argued in that Case, as it has been in this, that, as the Answer was sufficient at the time it was filed, it could not become insufficient by matter subsequent: but the *Lord Chancellor* said that, as the time within which the penalties must be recovered, had expired at the time when the second Answer came in, the Defendant could not protect himself from answering, although at the time of putting in his first Answer, to which the excep-

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tions had been taken, the objection to answering was valid, and the Answer sufficient.

Mr. *Roupell*, for the Defendant :—

The Cases that have been cited from Yelverton and Cro. Jac. have no application ; as they are only Cases in which a disability was removed. The Plea is a defence applying to the Record as it stood when the Plea was filed. The Court cannot go out of the Record to find circumstances to defeat the Defence, but ought to consider it as it was at the time when it was made, and, if it was good then, to give it effect now.

The VICE-CHANCELLOR :—

The question is whether, inasmuch as, at the time when the Plea was filed, proceedings might have been taken for the recovery of the Penalties, the Defendant is protected from answering, although, at the time when the Plea is heard, the period limited by the Act of Parliament for taking those proceedings, is expired. It is a settled rule that a Court of Equity will not compel a Defendant to make a discovery which will subject him to pains and penalties : and, if this Plea had been heard at the time when it was filed, the principle of the rule would have applied to the case of this Defendant. But as it is manifest that, if the Defendant gives the discovery now, he will not be subjected to any pains or penalties, the reason of the rule wholly fails ; and, therefore, I think that this Plea ought to be overruled.

COOK v. BLUNT.

THE Bill was filed, by the Vicar of *Whittlesea St. Andrew*, in the *Isle of Ely*, for all the Tithes of the Parish, except those of Corn, Grain and Hay.

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12th and 14th
June, and
4th November.

Tithes. Parties.

The Improprate Rectors of the Parish were, in the first instance, made Defendants to the Bill; but their names were afterwards struck out, and the Bill was dismissed as against them.

To a Bill by a Vicar for some of the Tithes of certain Lands, no Persons except the Occupiers ought to be made Parties, although they allege that the Tithes in question have been always received or demanded by the Rector, and state that it is uncertain whether their Lands are or not within the Parish.

The Bill alleged that the Improprate Rectory, and the right to the Tithes of Corn, Grain and Hay, in the Parish of *Whittlesea St. Andrew*, and the Improprate Rectory, and the right to all Tithes, both great and small, of the adjoining Parish of *Whittlesea St. Mary*, belonged, and had, for some hundred years, belonged to the same Persons, and been held and enjoyed as one Property: that the number of Persons interested in the two Rectories was Thirty, and that, by reason of their number and the complication of their Interests, the Plaintiff had desisted from making them Parties. The Bill charged that the Reverend *T. Moore*, a former Vicar, did, during his life, receive, from the Owners and Occupiers of the Improprate Rectory of *Whittlesea St. Andrew*, an annual Sum of 200*l.*, which was paid in lieu or satisfaction of or for the small Tithes of that Parish; and that the Owners and Occupiers of the Rectory did, during the same period, continue to receive the small Tithes of the Parish, and that the present Improprators still continued to receive and demand, from the Occupiers of Lands in the Parish, the small Tithes

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thereof: but that, nevertheless, it appeared, from their own Title-deeds, and from many of their agreements with the present and former Occupiers, that the right to the small Tithes was in the Vicar, and that the Impropiators had not, nor ever had any claim thereto, except as Lessees or Farmers of Vicars, the Plaintiff's predecessors.

The Defendants, in their Answers, said that they were Tenants of Lands under the Improprate Rectors of both Parishes: that the boundaries of the two Parishes of *Whittlesea St. Andrew* and *Whittlesea St. Mary* were unknown, and that they could not set forth whether the Farms and Lands occupied by them were in the one or in the other Parish: that they believed that the Improprate Rectors did receive and still continued to receive and demand the small Tithes of the Parish of *Whittlesea St. Andrew* from the Occupiers of Lands in that Parish: and they submitted that the Rectors ought not to be dispensed with as Parties.

Mr. *Bickersteth*, Mr. *Tinney* and Mr. *Sidebottom*, for the Plaintiff.

Mr. *Horne* and Mr. *Knight*, for the Defendants, in support of the objection for want of Parties:—

The Plaintiff alleges, by his Bill, that the Improprate Rectors still continue to receive and demand, the small Tithes, from the Occupiers of Lands in the Parish; but that it appears, by their Title-deeds, that they have no right to them. It appears, therefore, from the Plaintiff's own statement, that the contest is not between him and the Occupiers, but between him and the Rectors, and

that his evidence is to be found in their Title-deeds. The Plaintiff, therefore, shows that the evidence, which it was necessary to resort to, was not in the power of the Defendants now on the record, but in the power of the Rectors. Now, what could be more unfair than that, after the Rectors had put in their Answers denying the Plaintiff's title, he should not have continued them before the Court?

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It is impossible that the Court should make such a Decree as is asked for, in the absence of the only parties who ever claimed these Tithes. The Defendants, according to the Plaintiff's own showing, are not the Persons who are withholding the Tithes. The Rectors are the persons who are receiving them from the Defendants, either in kind, or in the shape of increased Rent, on account of their Lands being let to them tithe-free.

Where the defence made is either that the Rector, as against the Vicar, or the Vicar, as against the Rector, claims the Tithes in question in a Suit, and either of those persons is absent from the Record, the Court must judge for itself, according to the nature of the case and the general principles of Courts of Equity, whether justice can be effectually done, without having either the one or the other of those persons, as the case may be, upon the Record. That is the rule that was laid down by Sir T. Plumer in *Daws v. Benn* (a). *Wallis v. Pain & Underhill* (b), is an authority to the same effect. The rule was followed in *Clarke v. Stapler* (c),

(a) 1 J. & W. 513. (b) 2 Gwill. 749. Com. Rep. 633.

(c) 3 Gwill. 926.

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and *Steers v. Brassier* (*d*). The particular circumstances of this Case render it highly necessary that the Rector should be made a party to this Suit, as the perception of those Tithes has always been in him, and the Vicar, as a claimant of Tithes, is a perfect stranger to the Occupiers. The Rector should be here to defend his rights, when an inheritance, which has been enjoyed by him and his ancestors from time immemorial, is sought to be taken from him. The Plaintiff, if he succeeds in this Suit, will compel the Occupiers to pay to him the arrears of the Tithes which he claims, for six years prior to the filing of his Bill: but the Occupiers, owing to the acquiescence or lying by of the Vicar, will not be able to recover, from the Rectors, what they have paid, prior to the period of six years from the commencement of any proceeding that they may take for that purpose.

The Court is asked, in this Suit, to decide, in the absence of the Rector, not only whether the Vicar was ever endowed of the Tithes which he seeks to recover, and, if he was so endowed, whether, under the circumstances of the case, a re-grant of those Tithes ought not to be presumed; but also whether the Lands, the Tithes of which are claimed, are or are not within the Parish. The object of a Court of Equity is, by one Decree, to do final and complete justice upon the matter before it. But how can all the questions that are raised upon this Record be finally determined, without having the Rectors, the Lords of the two Manors, and the Vicar of the adjoining Parish, before the Court?

CASES IN CHANCERY.

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The VICE-CHANCELLOR:—

In this Case the Bill is filed by the Plaintiff, who claims, as Vicar of the Parish of *Whittlesea St. Andrew*, to be entitled to all Tithes, except the Tithes of Corn, Grain and Hay; and he has filed his Bill against several Defendants, who are alleged to be occupiers of Land in the Parish of *Whittlesea St. Andrew*.

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Now the Defendants, by their Answer, admit the Presentation, Institution and Induction of the Plaintiff; but they put in issue the question, whether the Benefice is a Vicarage or not; and then, admitting that they do occupy Lands in the Places which are mentioned in the Bill, they raise a question whether those Lands are in the Parish of *Whittlesea St. Andrew*, or not. They do not affirm that the Lands are not in that Parish, nor do they affirm that the Lands are in any Parish specified; but they only raise the question, whether the Lands, alleged in the Bill to be occupied by them, are in that Parish of *Whittlesea St. Andrew*: and they also raise the question, whether the Plaintiff, if he be Vicar, be entitled to the Tithes which are other than the Tithes of Corn, Grain and Hay: and it is represented that certain Persons, who are Impropriators, are, themselves, entitled to those Tithes: and the question is expressly raised, upon the Record, whether or not the Impropriators should be Parties.

Now I am of opinion that it was not necessary, in this Case, to make the Impropriators Parties: and I am of that opinion upon the authority of the Cases of *Williams v. Price* (e) and *Williamson v. Hutton* (f).

(e) 4 Price, 156. (f) 9 Price, 187.

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I think that they ought not to have been Parties; and that they have been properly omitted as Parties: and I ground my opinion upon the very reasons adopted, by the Lord Chief Baron, in his Decisions upon those two Cases. In the first, he assigns as a reason, that no Decree could be made against the Impropiator; and, in the second, that a Bill for an account of Tithes is a mere Possessory Bill. It was alleged that there were Decisions to the contrary; and the Decision that was relied upon as an opposite Decision, was the Case of *Daws v. Benn* (g), which was a Case at the Rolls.

Now, in the Judgment which was delivered, by Sir *Thomas Plumer*, in the Case of *Daws v. Benn*, he relied upon the Case of *Wallis v. Pain* (h). But it is observable that, in that Case, which was heard in 1738, the Bill was filed by the Lessee of the Impropiator, and the Cause was ordered to stand over, to make the Vicar a Party; and the consequence of that was, not that any Decree was made for the Vicar, but that the Bill was dismissed with Costs. Therefore what took place in that Case exemplifies the truth of what the Lord Chief Baron said in one of the Cases I have referred to, namely, that there could be no Decree for the Vicar, (that is to say,) for that Ecclesiastical Person who was represented, by the Occupier, to have a Claim opposed to that of the Plaintiff.

In the two cases which I shall next mention, it appears that the adverse Claimant, who was the Vicar in the first, and the Impropiator in the second, was made a party. The first of these Cases is *Steers v.*

(g) 1 J. & W. 513.

(h) 2 Gwill. 749. Com. Rep. 633.

Brassier (i), which was decided in the year 1736; and there a Decree was made against the Vicar. It is extremely doubtful whether such a Decree could be supported; because the question was, whether the Occupiers were to pay Tithes or not, to the Plaintiff; and, if they had made a Composition for the Tithes, which they had paid to some other person, it seems a very singular thing, in a Tithe Cause, to make one Ecclesiastical Person, who had received payment from the Occupier, hand over, to the other Ecclesiastical Person, who was the Plaintiff, what the first had so received. However, there was a like Decree in the Case of *Clarke v. Stapler* (k), and there a Decree was made against the Impropiator.

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But the Case of *Daws v. Benn* is essentially distinct from the present Case; and the Judgment in *Daws v. Benn* does not, of necessity, overrule the Decisions of the late Lord Chief Baron. Because, in the Case of *Daws v. Benn*, the Vicar was, at first, made a Party, the Bill being there filed by a Person claiming in the character of Rector; and, in the progress of the Suit, the Vicar died, and the Suit was brought to a hearing with a manifest defect of Parties upon the Record; because the Vicar, having been made a party originally, and having died, it then appeared that there were no Representatives of that Person who were parties upon the Record, neither was the Successor of the Vicar made a Party: and, therefore, abstracted from all other considerations, I conceive that the Judgment in *Daws v. Benn* was right, upon the very ground which Sir Thomas Plumer, at last, takes in his Judgment; because the previous matter into which he entered only

(i) 2 Gwill. 742. (k) 3 Gwill. 926.

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related to the point generally, but did not, of necessity, bring him to the conclusion which he finally adopted, having regard to the state of that particular Record.

Now, in the present Case, the Record comes to a hearing with the Vicar as Plaintiff, and certain persons named as Occupiers, as Defendants; and, therefore, there is no defect of Parties apparent upon the Record, as there was in *Daws v. Benn*.

It is to be observed that the opinion of Lord Chief Baron *Richards* is supported by the decision in *Hodgson v. Smith* (1), where, though the Vicar was not a Party to a Bill by the Impropiator against the Occupiers, the Court decided for the Plaintiff, against the Defendants, who set up a Title in the Vicar, with whom they had compounded. That appears to me, therefore, to be one of the strongest Authorities that can be cited for the purpose of showing that it cannot be laid down as a general proposition, that, where one Person claiming by an Ecclesiastical Title files his Bill against the Occupiers, it is necessary to make another Person, claiming by some other right, as Vicar or as Impropiator, a Party to the Suit, merely because the Occupiers, who are Defendants, say that that Person is, himself, entitled to the Tithes.

Now, in this Case, the Impropiators were first made Parties and then were struck out; but, had they remained upon the Record, I could not have made any Declaration of Right which would have given to them the fruits of these Tithes. The only consequence of having it made out, upon this Bill, that the Vicar was

not entitled, would have been that those Persons in whose favour no Decree could have been made, would have had the Bill dismissed as against them, with Costs, to be paid by the Plaintiff. I am, therefore, of opinion upon that general ground that, in this Case, it was right to omit the Impropriators; and I am further of opinion that, if there be any weakness in the general ground, yet when it does appear, as found upon this Record, that the character of Impropriator and Rector is divided amongst such a numerous body of Persons as appear to be interested in the Impropriator's Tithes, that was an additional reason why, in this Case, they should not be made Parties to the Record.

1828.

COOK
v.
BLUNT.

DAVIES v. WESCOMB.

THE Testator in this Case, after devising a Real Estate to his Widow, and bequeathing to her his Personal Estate, exempt from the payment of his Debts, devised the Residue of his Real Estates, to Trustees, in trust to sell for payment of his Debts; and, subject thereto, he gave the same Estates to his Sister, *Frances*, (who afterwards married *Charles Thruston*,) for Life, without impeachment of Waste, with Remainder to her first and other Sons in Tail.

The Trustees sold part only of the Estates, and cut down and sold Timber and other Wood on other parts of the Estates, and applied the Proceeds in payment of the Debts.

of the Debts: Held, that *A.* was entitled to have the amount raised by sale of the Estates, and paid to him

15th July.

Tenant for Life.

Devise to Trustees, in trust to sell, for payment of Testator's Debts, and subject thereto, to *A.* for Life, sans waste, Remainder to his first and other Sons in Tail. The Trustees sold Timber on the Estates, and applied the Proceeds in payment

1828.

DAVIES

v.

WESCOMB.

Pending the Suit *Mrs. Thruston* died, and her Husband took out Letters of Administration to her.

The Cause having come on for further directions, *Mr. Pemberton*, for *Mr. Thruston*, said that he did not mean to contend that the Trustees could have sold the Estate separate from the Timber, but that they had no right to denude the Estate of Timber, and sell it for payment of the Debts, when the Trust was to sell the Estates for that purpose; and that they ought to have sold a competent part of the Estates with the Timber upon them. He referred to *Cholmeley v. Parton* (a), and *Burges v. Lamb* (b).

Mr. Thomson appeared for the eldest Son of *Mr.* and *Mrs. Thruston*, who was an Infant, and said that the whole Estate was subject to the payment of the Debts, and that therefore the Timber was rightly sold for that purpose.

Mr. Turner and *Mr. Bichner* appeared for other Parties.

The VICE-CHANCELLOR:—

By the act of the Trustee, the Wood and Timber, which would have belonged to the Tenant for Life, have been applied in relieving the Inheritance from a burthen to which it was subjected by the Testator: and, therefore, the Tenant for Life is entitled to a charge on the Inheritance for the Sum for which the Timber and other Wood were sold.

Reg. Lib. A. 1827, fol. 2648.

(a) 3 Bing. 307.

(b) 16 Ves. 174.

THE ATTORNEY GENERAL v. THE MAYOR
AND CORPORATION OF CARLISLE.

1828:
6th November.

Practice.
Demurrer.

THE Defendants, *The Mayor and Corporation of Carlisle*, and *William Nanson*, moved for liberty to file a general Demurrer to the Information and Bill, notwithstanding they had obtained an Order for time to plead, answer or demur, not demurring alone.

Leave given to file a general Demurrer after the second Order for time had been taken out, the Subpœna having been made returnable immediately, and there having been no wilful delay on the part of the Defendants.

The Affidavit made, in support of the Motion, by Mr. *Donald*, the Agent for the Defendants on whose behalf the Motion was made, was to the following effect: That the Subpœna, which was made returnable immediately, was issued on the 24th of July 1828; that, on the 28th of that month, an appearance was entered for the Defendants, and an office-copy of the Bill bespoken, which was sent to the Deponent three or four days afterwards: that, on the 4th of August, the Deponent sent a close copy of it to the Defendant *Nanson*, who resided at *Carlisle*, and was the Town Clerk of that City, and the Solicitor to the Corporation: that, on the 5th of August, the Deponent was under the necessity of setting off for the *Northumberland* Assizes, and, on the same day, the usual note of attachment for want of an Answer, was handed over, by the Plaintiffs', to the Defendants' Clerk in Court, and, on the 20th, an Attachment and Distringas were sealed: that, on the 13th of the same month, the Deponent received instructions, from *Nanson*, to lay the Information and Bill before Counsel, to advise as to the proper defence; which was immediately done: that the Counsel

1828.
ATTORNEY-
GENERAL
v.
MAYOR, &c.
of
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advised a general Demurrer to be filed, and prepared one accordingly; but, before it could be filed, the Attachment and Distringas were sealed: that, on the 21st of the same month, the usual Order for time to plead, answer, &c. was obtained, by Petition, with the consent of the Plaintiffs' Agent, and on payment of Costs: that, on the expiration of that Order, the Deponent, with a view to prevent Attachments being again issued, obtained a second Order for time: that the question in the Suit could be properly determined upon the argument of a general Demurrer: that the Subpœna, if it had not been made returnable immediately, would not have been returnable before the first day of Michaelmas Term 1828, being the day on which this Motion was made, but that, the same having been made returnable immediately, it was impossible for the Defendants to file their Demurrer within eight days from the time of appearance, and that the Demurrer would have been filed before the end of August, if the Defendants had not been precluded from filing the same by the steps which were necessarily taken in order to prevent the execution of the Attachment and Distringas.

Mr. *Matthews*, in support of the Motion, said that, if the Plaintiffs had not obtained, under the new Orders (a), a Subpœna returnable immediately, it would not have been returnable until the first day of Michaelmas Term; and that then the Defendants would have had abundance of time to file a Demurrer; but that, under the circumstances of the case, it was impossible for them to do so within the time allowed for that purpose: and that where a strict compliance with the rules

(a) See the first Order.

of the Court rendered it impossible for a Defendant to avail himself of the defence which he was entitled to make, he might make a special application for leave to make that defence.

Mr. *Purvis* opposed the Motion, and said that, eight days after appearance, the Plaintiffs handed over the usual note of Attachment; that, on the 20th of *August*, an Attachment was sealed; and on that occasion the Defendants took out the usual Order for time; and that they did not take out the second Order till three weeks after the first Order had expired; that, though the Agent was compelled to be absent, his Clerk might have acted for him.

The VICE-CHANCELLOR :—

I cannot conceive what harm can arise from granting this Motion. The Appearance was entered four days before it need have been done : and there is nothing, in this Case, that can be imputed to the Defendants, as wilful delay.

Motion granted on payment of Costs.

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GENERAL

v.

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1829 :
2d March.

Practice.

Course of proceeding to compel a Defendant to deliver possession of Estates to a Receiver.

GREEN v. GREEN.

FOR a Report of the previous Proceedings taken in this Cause, to compel the Defendants, *John, Thomas,* and *George Green*, to deliver up, to the Receiver, the Possession of part of the Real Estates in question in the Suit, *see Ante*, page 394.

Mr. *Cooper* now moved that those Defendants might be ordered to deliver up Possession of the Premises in their occupation, to the Receiver, within a week after service of the Writ of execution of the Order to be made on that Application.

Mr. *Agar*, and Mr. *Knight*, opposed the Motion, and said that the order now sought to be obtained, was unnecessary; because the order of the 14th of March 1826, had directed the Defendants to deliver up Possession to the Receiver; and that no further step could be taken, until a Writ of execution of that Order had been served on the Defendants.

The VICE-CHANCELLOR :—

The course of Proceeding to be taken in order to compel a Defendant to deliver up Possession of Lands, is correctly stated, by Mr. *Dickens*, in his Report of *Dove v. Dove*, (a); and it also appears, from the Form

(a) 2 Dick. 617.

CASES IN CHANCERY.

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of the Writ of Injunction to deliver Possession, which is given in that Report (*b*): First, there must be an order to deliver Possession, and then a Writ of execution of that Order must be served on the Defendant; and, until that is done, no further Order can be made. I can not, therefore, make any Order upon the present Application.

1829.

GREEN

v.

GREEN.

Motion refused, with Costs.

HARRIS v. HARRISON.

THE Answer in this Cause was filed in February last. A Petition had been lately presented, at the Rolls, for an Order to amend the Bill. The Secretary declined to draw up the Order, on the ground that the Application was not made within the time limited by the thirteenth of the new Orders.

1828:
1st November.

Practice.
Amendment.

The 13th Order does not apply to a Case in which the Answer was filed before the first day of Easter Term 1828.

Mr. *James* now applied, to the Court, that the Secretary at the Rolls might be directed to draw up an Order according to the Prayer of the Petition. He said that the Secretary thought that the time allowed by the thirteenth Order, began to run from the first day of Easter Term last, under the seventy-eighth Order; but that, according to the construction which he put upon the latter Order, the former one did not, at all, apply in the present Case.

(*b*) 2 Dick. 621.

1828.
HARRIS
v.
HARRISON.

The *Vice-Chancellor* said that the construction of the seventy-eighth Order, which Mr. *James* contended for, appeared to him to be right, and directed the Order to amend to be drawn up.

END OF PART III.

CASES IN CHANCERY

BEFORE THE

VICE-CHANCELLOR.

BARRAUD v. ARCHER.

IN May 1824, the Plaintiffs sold by Auction, to the Defendant, an Estate in the Isle of *Ely*. The Particular described it as consisting of Fen Land, and as being let to *John Ingle*, as tenant from year to year, at the Rent of 165*l.*, and mentioned that the Lessor allowed the *Eau Brink* Tax of 13 *l.* 12*s.* 8*d.*, and 2*s.* for Land Tax. The Defendant afterwards refused to complete his contract, unless a compensation was made to him in respect of certain Embanking and Drainage Taxes to which the Estate was subject under a Local but Public Act of Parliament, but which Taxes were not mentioned in the Particular of Sale. The Bill was filed to compel a Specific Performance, without Compensation. The Defendant, in his Answer, said that he had never seen the Estate, but admitted that he had been informed, before he purchased it, that it was situate in a District liable to some Drainage and Embanking Taxes, and that the annual amount of them did not exceed 2*s.* 6*d.* per acre; he said that the Taxes in question were charged, by the Act, on the Lands on which they

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1828.

20th Nov.

1829.

5th December.

*Vendor and
Purchaser.
Compensation.*

An Estate, consisting of Fen Land, and so described in the Particular of Sale, was charged by a local but public Act of Parliament with Drainage and Embanking Taxes, of which the Purchaser had no express notice.

Held, that he was not entitled to a Compensation for those Taxes.

1828.

BARRAUD

v.

ARCHER.

were respectively imposed, and that any Tenant paying the same, was authorized, by the Act, to deduct the amount from his Rent, as if he had paid the same, to his Landlord, in part of his Rent, and that, therefore, those Taxes were not, in fact, payable by the Tenant, but by the Landlord; that they might, according to the Act, if it should be found necessary, amount to 8 s. an Acre annually, being altogether an annual charge of above 55 l.; and he submitted whether the Particular of Sale duly stated such Taxes as were paid or allowed by the Landlord.

The Auctioneer's Clerk deposed that, at the Auction, previously to the Defendant being declared the purchaser, the Defendant and the Auctioneer entered into a discussion respecting some of the Taxes payable in respect of the Estate but not mentioned in the Particular, and that the Auctioneer referred the Defendant to *Ingle*, the Tenant, who was present. The Auctioneer deposed that the Defendant, before he was declared the Purchaser, repeatedly observed to him, the Auctioneer, that the Drainage and *Eau Brink* Taxes were heavy and varied; to which the Auctioneer replied that, whatever Taxes the Estate was subject to, the Tenant paid them, and that the only allowance made to him was what was mentioned in the Particular, and this statement was corroborated by the Tenant. The same Witness further said that, previous to the Sale, a conversation took place between different Persons then present, (the Defendant being one of them), respecting the Embanking and Drainage Taxes, and that some of those Persons observed that the Taxes to which the Estate was liable, varied. Mr. *Ingle* deposed that during the Auction, a Farmer who lived in the neighbourhood of

the Estate, stated, in the presence and hearing of the Defendant, that the outgoings upon it were 50*l.*, meaning thereby the *Eau Brink*, Land, and Drainage and Embanking Taxes, which then amounted to 48*l.* per annum. Mr. *Ingle* further stated that, by the agreement between him and his Landlord, he was to pay the Embanking and Drainage Taxes, and his Landlord was to pay or allow the *Eau Brink* and Land Tax; that it was generally known, throughout the part of the country where the Estate was situate, that all Fen Lands were subject to heavy Annual Taxes, for the Drainage and Preservation thereof, and that the amount of them was published annually, by notices affixed on the Church-doors: that the amount of those Taxes had been nearly the same for the last twenty or thirty years, and had been paid by the Landlord or Tenant, according to the agreement between themselves.

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BARRAUD
v.
ARCHER.

Mr. *Sugden* and Mr. *Keene* for the Plaintiffs:—

The Particular expressly mentions that the Estate is Fen Land, and enumerates all the Taxes which the Landlord allowed to the Tenant. It is not disputed that this representation was correct. But the Defendant says that we have not stated that there are certain other Taxes which the Tenant pays. Our answer is, that it is not usual to state the Taxes which a Tenant pays. The question is, whether the representation was fair. It was not mentioned, either in the Particular, or at the Sale, that there were no other Taxes than the *Eau Brink* and Land Tax. The Estate was sold as Fen Land; and therefore the Vendors were not bound to mention a single Tax. At all events enough was stated to put the Defendant on inquiry. The Evidence makes

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BARRAUD
v.
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were respectively i . The Tenant was present at th
the same, was a . The Auctioneer referred the Defendant to
amount from t . The Land which is let to a Tenant,
his Landlord . The Terms under which the Tenant
those Tax . *v. Round (a), Hall v. Smith (b), Daniels*
but by t .
Act, i' .
Acr . *Pepys and Mr. Rolfe for the Defendant :—*
at .

The question is, whether such a representation was
made as to the Embanking and Drainage Taxes, as to
make it compulsory on the Defendant to take the
estate subject to those charges. It is very important
to observe that the Particular is not silent as to the
Incumbrances to which the Estate was subject, but
expressly mentions them; and the meaning of the
Particular is, that the *Eau Brink* Tax and the Land Tax,
were the only Incumbrances on the Estate. Though
the Act by which the Embanking and Drainage Taxes
are imposed is a Public Act, so that it is not necessary
to plead it specially, yet it could not be the intention
of the Legislature to fix all persons with notice of its
contents. The Act created an annual charge upon the
Land; and a Purchaser cannot be deemed to have
notice of the charge, merely because the Act contains
the common clause making it a Public Act. *Lord*
Townsend v. Granger (d). The declarations of the
Auctioneer are not admissible as Evidence with regard
to the Contract.

The VICE-CHANCELLOR:—

In *Lord Townsend v. Granger*, the Purchaser was
allowed a Compensation on the ground that there was

(a) 5 Ves. 508. . (b) 14 Ves. 426. (c) 16 Ves. 249.
(d) Before Sir John Leach, but not reported.

representation made by the Auctioneer at Here that doctrine does not apply, as there misrepresentation. The Act which imposed Embanking and Drainage Taxes, is a Public Act. Therefore decree a Specific Performance of the Contract without a Compensation.

1828.

BARRAUD

v.

ARCHER.

THE ATTORNEY GENERAL v. THE MAYOR AND CORPORATION OF CARLISLE.
DOBINSON v. THE MAYOR AND CORPORATION OF CARLISLE.

1828.

26th Nov. and
5th December.

Charity.

AN Information and Bill was filed, in this case, in which certain Persons who were residents within the City and Liberties of *Carlisle* were both Relators and Plaintiffs; and the Defendants were the Mayor and Corporation of that City, together with *James Wileoughby*, who was the Clerk to the Commissioners under an Act of Parliament after mentioned, and *William Nanson*, who was the Clerk to the Corporation. It stated that, previously to and during the reigns of Henry 2d, Henry 3d, and Edward 1st, the Citizens of *Carlisle* held of the *Crown*, during its pleasure, the City of *Carlisle*, and two Mills in or near the same, and a Fishery in the River *Eden*, in *Cumberland*, and, also, the Toll of the County, together with the Liberties, Free Customs, Privileges and Appurtenances to the City and other the Premises belonging, at a Rent of 52 *l.* per annum, during the reign of King Hen. 2d, and at a Rent of 60 *l.* per annum during the reigns of King Henry 3d, and King Edw. 1st.: that King Edw. 2d, being desirous of im-

A Grant, from the Crown, of certain Privileges and Property, for the defence of and preservation of peace within a City, is a Charitable Gift: *See Semble.*

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GENERAL

v.

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of CARLISLE.

DOBINSON

v.

Same.

proving the City, and of enabling the Citizens to attend to their business in peace and quietness, made to them a Grant of the City and other the Premises, in Fee, *upon Trust* that they should provide for the Peace of the City and its Inhabitants; and that such Grant was made by a Charter, dated the 12th of May, in the 9th year of Edw. 2d, and which was, partly, as follows: "Know ye that, for the bettering of our City of *Carlisle*, and that our Citizens of the same City may be able, for the time to come, to apply themselves to their business in the said City under greater tranquillity and in quiet, and may be the more fully animated to fortify and defend that City, if the City itself be specially committed to the custody of themselves, have granted to them, and, by this our Charter have confirmed, for us and our Heirs, the said City, and our Mills of the same City, and our Fishery in the Water of *Eden*: To have and to hold, to them and their Heirs and Successors, Citizens of that City, of us and our Heirs, at Fee Farm, together with the Liberties, Free Customs, and all other things to the aforesaid City, Mills, and Fishery in anywise pertaining, rendering thence, to us and our Heirs, yearly, at our Feast of *St. Michael*, eighty pounds for ever: We have also granted to them, and, by this our Charter have confirmed, for us and our Heirs, our vacant Places within the aforesaid City and the Suburbs thereof, and that they and their Heirs and Successors may build those Places, or grant them to others, in Fee or otherwise, and thence make their Profit, at their will, in aid of the aforesaid Farm; and that they and their Heirs and Successors, Citizens of the aforesaid City, may be free of Toll, Pontage, Passage, Lastage, Wharfage, Carriage, Murage, Pannage, and Stallage of their Business and Merchandizes, through all our Kingdom."

The Information and Bill further stated that the Citizens continued in the enjoyment of the Premises, *upon Trust as aforesaid*, until the 23d year of Edward the 3d, when they were interrupted in the enjoyment of some part thereof, by the Sheriff of *Cumberland*; and that, thereupon, an Inquisition as to the same was held; and that Edw. the 3d. in the 26th year of his reign, made a Charter of Confirmation to the Citizens, by which it was recited that the Citizens of *Carlisle* had had, and been used to have, the several Rights, Privileges and Immunities therein enumerated, some of which were the full Return of all Writs, a Market and a Fair, and Trial of Felonies; and also to hold Pleas of the Crown, and Chattels of Felons and Fugitives; and also Common of Pasture, and Turbary on the King's Moor; and that they ought to be quit, through all the Kingdom, of Toll, Pontage, Passage, &c.; and that the Citizens had a certain place to the City annexed, called the *Battail Holme*, which served for the Market and Fairs, and that they had had the aforesaid Liberties and Quietances from time to which memory did not exist, in aid of the Citizens of the City, and of the Farm of the same; and that they had the Mill of the City, and the Fishery of the King in the Water of *Eden*, Toll inward and outward, and the small Farms of the City as parcels of the Farm of the City; and that the Citizens had had all the Liberties and Profits aforesaid from time to which memory was not: and His Majesty then granted unto the Citizens, their Heirs and Successors, all the Premises, Rights, Liberties, Free Customs and Privileges mentioned in the Inquisition. The Information and Bill next stated that, at the times the Grants were made, and previously thereto,

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GENERAL

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v.

Same.

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v.

Same.

the Kings of England, for the military defence of the City from the Scotch, kept a strong Garrison in the Castle, and that the express object of the Charters and of the Kings in granting the same, was *upon Trust* that the Citizens might, out of the Property and Revenue contained in the Grants, keep Peace, not merely within the City, but also within the Liberties, and might also thereout assist the Garrison in resisting any external attack which the Scotch, or other Enemies of the King, might make on them: That the Citizens accordingly accepted the Grants *upon the said Trusts*, and, in pursuance thereof, maintained and kept a Mayor and two Bailiffs, and certain other Officers; and that, in further pursuance of *their said Trust*, the Citizens provided and kept up both a Prison and a Lock-up-house; and that such Mayor, Bailiffs, and other Officers were paid for their services, and the Prison and Lock-up-house were provided and kept up, out of the Property and Revenues contained in the Grants: That, from the time of the Grants until the time after-mentioned, no Peace Officer whatsoever, saving the Peace Officers of the Citizens so paid as aforesaid, ever existed within the City or Liberties: that Charles the 1st, in the 13th year of his reign, in compliance with a Petition presented to him by the Citizens, confirmed the before-mentioned Grants; and that the Charter of Confirmation, after reciting that the Mayor and Citizens had besought his Majesty to confirm the former Grants, and also to grant anew some other things, for the better governing and advantage of the City, proceeded thus: "Now know ye, that we, graciously assenting to the said Petition, and willing to provide for the bettering of the aforesaid City, and

that there may be had, in the same City, one certain and undoubted order and measure for the keeping of our peace, and the good rule and government of the People therein, and that the aforesaid City, henceforward, may be and remain a City of peace and quietness, and that our peace and other acts of justice may be preserved therein, and hoping that, if the Mayor and Citizens of the said City, and their Successors, should enjoy, from our Grant, more ample Donations, Liberties and Privileges, then they may feel themselves more forcibly enjoined and obliged to those services which they may be able to render and show forth to us, our Heirs and Successors:” that the Charter then incorporated the Citizens under the style of “The Mayor, Aldermen, Bailiffs and Citizens of the City of *Carlisle*,” and empowered them to make Laws for the good rule and governance of the City, and of the Officers and the Residents within the same, and for setting forth how they should demean themselves for the public good, and good rule of the City, and other matters concerning the same. The Information and Bill then stated that the Corporation, in pursuance of the said Charters and the said Trusts, maintained and paid, out of the Revenues arising from the Rights, Privileges and Property comprised in the Charters, certain Bailiffs, Beadles and other Officers for the purpose of keeping Peace within the City and Liberties, and kept up the Lock-up house, and a Prison for Debtors and Persons convicted at the Sessions for the City; and that, from the granting of the Charter of Incorporation until after the passing of the Act of Parliament after-mentioned, no Person residing within the City or Liberties ever paid, or was called upon to pay, any sum of Money towards the

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GENERAL
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—
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Same.

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ATTORNEY-
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v.

Same.

support or maintenance of any Officer employed in keeping the Peace of the City and Liberties, or in administering justice therein, the Corporation being bound, by the Charters and the Trusts therein mentioned, to provide a sufficient number of Officers for such purposes, and to pay for the same out of the said Property and Revenues : That, since the year 1823, the Corporation had dismissed some of the Peace Officers, converted the Lock-up-house into Shops, and pulled down the Prison : that the Corporation having thus neglected its Trust, and given up all care for the maintenance of the Peace of the City and Liberties, it became necessary to apply for an Act of Parliament for the keeping of Peace within the City and Liberties ; when it was proposed that the Corporation should contribute 300 *l.* a year for that purpose ; but that they refused to accede to that proposal, and denied that they were liable, by reason of the Charters, or any Trust therein contained, to contribute to the Expense ; and, Parliament being unable to try the question as to the liability of the Corporation, an Act was past in the 7th and 8th years of Geo. 4th, for Watching, Regulating and Improving the City of *Carlisle*, and the Suburbs thereof, by which certain Commissioners were appointed for carrying the Act into execution, who were, amongst other things, required to appoint Watchmen and Beadles, and to raise Money to defray the expenses of obtaining the Act, and carrying it into execution, and, for that purpose, to make Rates on the Occupiers of Houses and other Buildings within the City and Suburbs ; but it was provided that the Act should not extend to release the Corporation from any expense of protecting the peace of the City, nor to prevent any Person from proceeding against them for

the non-performance of any duty which, by Law, Charter, Custom or Prescription, they were bound to perform, or for the non-application of their Revenues for the purposes for which, by Charter, Custom, Prescription or Usage, such Revenues ought to be applied: That the Commissioners had proceeded to carry the Act into execution, and appointed Beadles or Watchmen, and levied Rates for their payment, and that, since the passing of the Act, the Corporation had not maintained any Peace Officer, or paid any thing towards the maintenance of the Police Establishment under the Act: That the whole of the Revenues of the Corporation arising from the Rights, Liberties, Free Customs, Privileges and Properties, comprised in the Charters, were applicable, after satisfying the ordinary expenses of the Corporation, and ought to be applied in keeping peace within the City and Liberties: That the said Rights, &c. having been given to the Citizens, in the first instance, and, afterwards, to the Corporation, coupled with the Trust of providing for the due order, peace and security of Persons and Property being within the City and Liberties, the Corporation had, nevertheless, in breach of such Trust, applied such part of its Revenues arising from the said Rights, &c. as ought to have been applied in keeping the said peace of the City, to their own purposes: That, besides the Charters before-mentioned, the different Kings of England granted, by various other Charters, various other Rights, Liberties, Free Customs, Privileges and Property besides those before-mentioned, to the Citizens, and that such other Rights, &c. were vested in the Corporation for the purposes before mentioned; and that such other Charters were in the possession or power of the Corporation, or its Clerk: That the Com-

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GENERAL

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of CARLISLE.

DOBINSON

v.

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DOBINSON

v.

Same.

missioners under the Act of Parliament, claimed an interest in such parts of the Revenues of the Corporation as were applicable to the keeping of the peace of the City and Liberties; and that, by the Act, the Commissioners were to sue and be sued in the name of their Clerk. The Information and Bill prayed for an Account of the Revenues of the Corporation which had, since the passing of the Act of Parliament, or since such other time as the Court should think proper, been produced by the said Rights, Liberties, Free Customs, Privileges and Property, and also of all Sums of Money which, during the same period, were of right payable, and had been paid, out of such Revenues; and that the Surplus of such Revenues, after such payments, might be ascertained, and be declared applicable to the keeping of the peace of the City and Liberties under the Act of Parliament, and that such Surplus might be applied accordingly, and be paid to the Commissioners for that purpose.

The Mayor and Corporation and Nanson, their Clerk, put in a General Demurrer to the Information and Bill.

Mr. *Horne*, Mr. *Mathews* and Mr. *Tinney* in support of the Demurrer:—

The Grants were made, to the Corporation, for civil, and not for eleemosynary purposes, and there is no instance of a Court of Equity interfering to compel a Civil Corporation to perform its duties. The proper mode of proceeding in such a case is by Mandamus in the Court of King's Bench (*a*). The *King v. Barker* (*b*). Although the word "Trust" is frequently used in the

(*a*) 1 Black. Comment. 481.

(*b*) 3 Burr. 1265.

Information, the term is misapplied, as no Trust was created by the Charters. The purposes to which the Revenues of the Corporation were to be applied, were not specific but general, and the Corporation were empowered, by the Charters, to dispose of the Property as their own, and, therefore, the Court would not enforce the performance of the Trust, if any existed. The *Attorney-General v. The Corporation of Carmarthen* (c), *The Mayor and Commonalty of Colchester v. Lowten* (d). Was the Court ever known to refer it to the *Master* to settle a scheme as to the mode in which the Revenues of a Civil Corporation were to be applied? Would it not be impossible to devise any such scheme, owing to the purposes, for which the Revenues of a Civil Corporation are to be applied, being so various, and fluctuating from day to day?

The Information asks that the Surplus of the Revenues beyond what has been applied for ordinary Corporate purposes, may be paid over to the Commissioners. How is this Court to exercise a judgment as to what are proper Corporate purposes, and what are not? Besides, the Corporation may say that, though they have not applied the Surplus, yet they have Corporate purposes to which they intend to apply it.

The Act of Parliament expressly says that the Rights of the Corporation are not to be prejudiced by any of its Enactments, and, therefore, leaves the Corporation exactly in the state in which they were before the passing of the Act. Now the Information seeks to divest them of the Privileges conferred by the Char-

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GENERAL

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(c) Coop. C. C. 30.

(d) 1 V. & B. 226.

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GENERAL

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ters. Its object is, not to compel the Corporation to appoint proper Officers for keeping the Peace, but to pay a portion of their Funds to certain other persons called Commissioners of Police, in order that they may apply it for the purpose of supporting and maintaining Officers appointed by themselves and not by the Corporation, and over whom the Corporation can have no control. If this were done, it would be a direct violation of the Charters, and of the Act of Parliament. The Commissioners have nothing to do with the Funds of the Corporation. In *The Attorney-General v. Heelis (e)*, the Court entertained jurisdiction, because a Fund was given for specific trust purposes, and the Commissioners and Trustees had no power to apply it to any purposes except those pointed out by the Act. Here the Funds are given, to the Corporation, for general purposes. Then there is the case of *The Attorney-General v. Brown (f)*, in which the Rates that were to be levied were to be applied for a specific object; and the only question that arose in that Case was, whether that object was such a Charitable Use as would authorize *The Attorney-General* to interfere with it by Information. The decision in *The Attorney-General v. Gort (g)*, proceeded on the same principle. Besides that Case differs from the present; because some of the Members of the Corporation had possessed themselves of the Funds to the exclusion of the rest, who had, in some measure, a right to have a control over the Funds, and to have an Account of them.

This is an Information and Bill, and the Plaintiffs are the same Persons as the Relators; but it does not

(e) 2 Sim. & Stu. 67.

(f) 1 Swanst. 265.

(g) 6 Dow P. C. 136.

appear that they have any Interest in the subject of the Suit which entitles them to appear as Plaintiffs.

Mr. Sugden, Mr. Bickersteth, and Mr. Purvis, in support of the Information and Bill :—

The Information and Bill sets out certain Grants made, to the Corporation, for specific services to be performed by them, by way of Trust, and alleges that they did, in execution of the Trust, actually perform the obligations thus imposed upon them ; and the confirmations were made upon that ground. We do not mean to deny that there was a benefit intended to the Corporation, beyond the purposes which were the main objects that the Grantors had in view. Our proposition is, that an obligation was created of a nature to be enforced, in this Court, by way of Trust. We state that, by the Charters, a Trust was created : but, if there was any doubt as to the construction of those Instruments, the usage which we allege to have existed, in ancient and all succeeding times, might be called in aid to give a construction to them. All the Cases show that, if there is a general obligation to be performed by a Corporation, which is in the nature of a Charitable Use, this Court will give relief. The *Attorney General v. Brown* (h). The *Attorney General v. Heelis* (i). The *Attorney General v. Gort* (k); and The *Attorney General v. The Corporation of Dublin* (l). This last Case is directly in point.

The purposes for which these Grants were made are clearly Charitable Uses within the Statute (m). The Act of Parliament does not at all prejudice the right of

(h) *Ubi sup.* (i) *Ubi sup.* (k) *Ubi sup.*
 (l) 1 Bligh, New Series, 312.
 (m) 43 Eliz. chap. 4, and see Duke's Char. Uses, 130. 132.

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 DOBINSON
 v.
 Same.

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Same.

compelling the Corporation to contribute to the Rates which it directs to be levied. The Legislature thought that great consideration was due to our claim, and therefore expressly saved it.

Then we allege that, besides the Charters before-mentioned, the different Kings of England granted, by various other Charters, various other Rights, &c. besides those before mentioned, to the Citizens of *Carlisle*, and that such other Rights, &c. are now vested, in the Corporation, for the purposes before mentioned; and that such other Charters are now in the custody of the Corporation or its Clerk. Notwithstanding these allegations a Demurrer is put in, by which the Defendants admit that they have other Property which, at all events, is bound by these Trusts; and that they have, in their Custody, Documents which will show that there were such Trusts imposed upon the Property as this Court will enforce.

The *Vice-Chancellor* said, in the course of the Argument, that the two last Clauses in the Act of Parliament left the question just where it was before.

th December. On this day, His *Honor* delivered Judgment as follows:

In this Case it does not appear to me that it is very necessary to go much at length into the general question, independently of any particular expressions that are to be found in the Information itself.

I should observe that my Lord *Redesdale*, in giving his Judgment in the Case of *The Attorney General v. The Corporation of Dublin* (n), says: "There is, on this

(n) 1 Bligh, New Series, 337.

subject a Writ, in the Register, which recites that the King had been given to understand that his Predecessors had granted certain Rates on all Merchandize brought into a Town, to be applied to the walling of the Town; and the Inhabitants having complained that the Rates collected had not been duly applied, the Writ proceeds in the nature of a Commission for taking the Account. Under such circumstances an Information, at this moment, would lie at the Suit of The *Attorney-General*, for taking such Account. The practice of proceeding by Information rather than by the Writ of Account, has prevailed in consequence of the difficulty of proceeding under the Writ." And then, he says (o), "We are referred to the Statute of Elizabeth with respect to Charitable Uses, as creating a new Law upon the subject of Charitable Uses. That Statute only created a new Jurisdiction. It created no new Law: it created a new and ancillary Jurisdiction; a Jurisdiction borrowed from the elements which I have mentioned; a Jurisdiction created by a Commission to be issued out of the Court of Chancery." And Lord *Eldon*, in giving his Judgment, plainly seemed to think that, where there was any Fund created for the purpose of being applied to some public purpose, a Court of Equity had, by its original Jurisdiction, a right to see to the application of the Fund, although the application of it might not happen to be one of the purposes mentioned in the Statute of Charitable Uses. And his Lordship takes notice of his own Judgment in the Case of The *Attorney-General v. Brown*, and modestly says, that his Judgment in that Case is, in some measure, weakened by what The *Vice-Chancellor* (p) said in

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(o) See page 347.

(p) Sir John Leach.

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the Case of *The Attorney-General v. Heelis*. It certainly appears, as we collect from his expressions, that he does not altogether coincide with what was said, by *The Vice-Chancellor*, in that Case; but still it has not been overruled. *The Vice-Chancellor*, in that Case, says, (g) “I am of opinion that Funds derived from the Gift of the Crown, or from the Gift of the Legislature, or from private Gift, for paving, lighting, cleansing and improving a Town, are within the Equity of the Statute of Elizabeth, Charitable Funds to be administered by this Court.”

Now, in the present Case, although one might pause before one said that, without doubt, according to the construction of the first Charter which is stated, the Corporation were obliged to apply the whole of their revenues arising from the Gift, to public purposes, (because there are, certainly, words very strongly indicative of the intention of the Grantor that they should have them for their own use,) yet the Court cannot lose sight of the usage that has prevailed. Now it is clear, from the statement in the Bill and Information, that a usage has prevailed of applying the Revenues which the Corporation of *Carlisle* had, to public purposes; and, therefore, if it rested on the mere general Law, independent of any general expressions, I think it would not be very easy to sustain the Demurrer.

But it appears to me that all doubt is entirely removed by the mode in which the general charge is introduced into the Information; for it states that, although the Corporation was bound, by its Charters,

to have maintained, out of its Revenues, such part of the Police Establishment as is necessary to provide for the due order, peace and security of the Persons and Property being within the City and Liberties, yet the Corporation contend that they are not bound to pay any thing : and there afterwards follows this charge : "That, besides the Charters hereinbefore mentioned, their Majesties, the different Kings of *England*, granted, by various other Charters, various other Rights, Liberties, Free Customs, Privileges and Property, besides those hereinbefore mentioned, to the said Citizens of the said City, and that such other Rights, Liberties, Free Customs, Privileges and Property, are now vested in the said Corporation, for the purposes hereinbefore mentioned," that is, all the purposes before mentioned ; and it appears to me, therefore, that there being this general charge, independent of the general doctrine, this Demurrer must be overruled (r).

(r) This decision was affirmed by the Lord Chancellor, on the 4th of June 1830.

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1828:
3d November.
1829:
28th January.

*Pleading.
Statute of
Limitations.*

The Statute of Limitations, notwithstanding it is a defence at Law, may be pleaded to a Bill of Discovery in aid of an Action brought, provided it has been pleaded to the Declaration.

If the Action was commenced before the Bill was filed, the Plea must aver that the Cause of Action did not accrue within Six Years before the Action was brought.

MAC GREGOR v. THE EAST INDIA COMPANY.

THE Plaintiff was the Executor of the late Sir *John Mac Gregor Murray*, and the Defendants were *The East India Company*, and *William Astell*, one of the Directors, and *Joseph Dart*, the Secretary to the Directors. In 1785, Sir *John Mac Gregor Murray* was sent by Sir *John Macpherson*, the then Governor General of India, on a Secret Mission, to the Upper Provinces of Bengal, in order to obtain Information as to the Designs of the Native Princes, under a promise from Sir *John Macpherson* that he should be reimbursed his expenses out of the Funds of the Company. In 1822, Sir *John MacGregor Murray* died, without having been repaid his expenses; and in Trinity Term 1824, the Plaintiff commenced an Action of Assumpsit against the Company for the recovery of them. The Defendants pleaded the general issue, and also the Statute of Limitations. In Michaelmas Term of the same year the Bill in this Cause was filed, for a Discovery and a Commission to examine Witnesses in India, in aid of the Action. The Bill alleged that many applications were made, to the Company, by Sir *John Mac Gregor Murray*, in his lifetime, at various intervals and periods, for payment of his expenses; that the Company admitted the justice of his claim; and that promises and assurances were, from time to time, made, by the authority of the Company, or the Directors, or their Secretary, that the claim should be ultimately satisfied; and that the Defendants had, in their custody or power, divers Books, Accounts, &c. relating to the matters aforesaid, and, by

which, if produced, the several matters aforesaid, or some of them, did or would appear. The Defendants put in, to the Bill, three separate Pleas of the Statute of Limitations, in which they stated that they had pleaded several Pleas to the Action, and, amongst others, the general issue, but did not mention, expressly, that they had pleaded the Statute, to the Action.

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The Pleas to the Bill were argued, before Sir *John Leach*, V.C., on the 9th of November 1825, when His Honor was of opinion that they were bad, as it did not appear, upon the Record, that the Defendants had pleaded any Plea to the Action, which would preclude the Plaintiff from going into the merits of his Case and availing himself of the discovery sought by the Bill. Leave, however, was given to amend the Pleas. The amended Pleas came on for argument, on the 19th of April 1826, before the same Learned Judge, when it was objected that they averred that the Cause of Action (if any) arose above six years before the filing of the Bill, whereas they ought to have averred that it arose above six years before the commencement of the Action, which was prior to the filing of the Bill. His Honor allowed the objection, but again gave the Defendants leave to amend their Pleas, which was accordingly done. The Pleas so secondly amended, after stating the date and title of the Statute of Limitations, and the bringing of the Action for the same purposes respecting which the discovery was sought, and setting forth the Pleas to the Declaration, alleged that, if the Plaintiff, either in his own right, or as the Executor of the Testator, ever had any Cause of Action, against the Defendants, for the matters contained in the Bill, the same accrued above six years before the

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1828:
3d November.

commencement of the Action; and that the Defendants did not, by themselves, or any other person, at any time within six years before the commencement of the Action, or from the commencement of the last mentioned period of six years down to the filing of the Bill, or down to the time when the Defendants were served with Process to appear to and answer the Bill, promise or agree to come to any account for, or to pay or anywise satisfy the Testator, in his lifetime, or the Plaintiff, since his death, any Money for any of the matters alleged in the Bill. On these Pleas coming on for argument:

Mr. Sugden and Mr. Roupell, for the Plaintiff, contended that they must be overruled because the Defendants had, neither by their Pleas, nor by answers in support of them, denied the allegation as to their having in their custody the Books and other Documents mentioned in the Bill, the contents of which might prevent the Statute of Limitations from being a bar to the Action.

The VICE-CHANCELLOR:—

A Plea of the Statute of Limitations need not deny the usual allegation that the Defendants have Books, &c. in their custody, unless it is alleged that those Books, &c. would show that a promise had been made within Six Years.

The question is, whether the mere general allegation that has been referred to, is to be taken as an averment that there were in the possession of the Defendants Documents which would overrule their Plea, and show that there has been a promise within six years; because otherwise the possession of these Documents is quite immaterial. Now, upon the authority of a Case (*a*) which was very much considered by my Predecessor, the present *Master of the Rolls*,

(*a*) *Qu. James v. Sudgrove*, 1 Sim. & Stu. 4.

I think that unless that allegation went further, and averred that, by these Documents, or some of them, if produced, it would appear that a promise had been given within six years, the mere allegation that the Defendants had in their possession Papers relating to the matters aforesaid, and by which, if produced, the several matters aforesaid, or some of them, do or would appear, is immaterial, there not being, as I recollect, any charge in the Bill that there has been a promise made within six years, which promise is evidenced by any writing whatever; and, consequently, it appears to me that it was not necessary for the Defendants to negative this general Allegation, either by Averments in their Pleas, or by Answers in support of their Pleas.

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Mr. *Sugden* and Mr. *Roupell* then contended that the Statute of Limitations could not be pleaded to a Bill for Discovery in aid of an Action at Law, because that Statute was a Defence at Law, and the Plaintiff was entitled to the Discovery in order to enable him to defeat the Defence at Law: that giving the Discovery could do no harm, because, if there was no legal right of Action, the Discovery would be of no use. *Hindman v. Taylor*, (b); *Leigh v. Leigh*, (c); Mitf. Plead. 218, 219.

Mr. *Horne* and Mr. *Wyatt*, for the Defendants, cited *Sutton v. Lord Scarborough* (d).

THE VICE-CHANCELLOR:—

The Counsel for the Plaintiff, grounding themselves upon Lord *Thurlow's* opinion, in *Hindman v. Taylor*,

(b) 2 Bro. C. C. 7.

(c) Ante, 1 Vol. 349.

(d) 9 Ves. 71.

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have argued that the Plea of the Statute of Limitations cannot be used in a Case like the present : but *Hindman v. Taylor* is no authority for that. That Case only shows that, if an Action is brought, and a Bill of Discovery is filed, and certain matters are pleaded, which, if discovered, would amount to a bar to the Action at Law, the Plea of those Matters cannot be used as a bar to a Bill of Discovery. But I do not find that Lord *Redesdale* has laid it down, or that it is laid down anywhere, that the Plea of the Statute of Limitations shall not be used as a bar to a Bill of Discovery : and I cannot, therefore, think that what appears to have been Lord *Thurlow's* opinion in *Hindman v. Taylor*, can be considered a sufficient ground for me to say that I shall overrule this Plea because it is a Plea of the Statute of Limitations.

1828 :
 15th December.

Costs.
 Injunction.
 Solicitor.

Injunction granted to restrain an Action for the amount of a Solicitor's Bill, which, had been taxed after the commencement of the Action, and more than one sixth had been taken off, but the Costs of taxation had not been ascertained.

WALTON v. JOHNSON.

HESELTON v. JOHNSON.

WILLIAM JACKSON, one of the Defendants, had employed *Robert Henry Anderson*, as his Solicitor and Attorney in the above Causes and in other Suits and Matters of Business. *Anderson* had delivered his Bill to *Jackson*, and, on its not being paid, commenced an Action for the Amount. *Jackson* then obtained an Order, referring the Bill to one of the *Masters*, for taxation. The Bill was taxed accordingly; and the usual Certificate was obtained, on the 11th August 1828, by which it appeared that more than one sixth of the Amount had been taken off. The Costs of the Taxation had not been ascertained, owing, as it was alleged, to

the *Master's* Office having been closed, for the long Vacation. On the 10th October 1828, *Jackson* was held to bail in the Action.

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JOHNSON.

Mr. *Knight*, for the Defendant *Jackson*, now moved that the Bail-bond might be delivered up, and all proceedings in the Action stayed. He said that he admitted that the Action was maintainable at Law; but that, after this Court had assumed jurisdiction as to the Costs, and made an Order for their Taxation, which, of course, contained a submission, on the part of the Defendant, to pay the Bill when taxed, which might be enforced by process of Contempt, this Court would not allow the Action to be proceeded in. *In Re Dillon(a)*; *Ex parte Bellott(b)*.

Mr. *Sugden*, contra:—

The Action was commenced before the Order for Taxation was obtained. It is clear that the Bill included business done in the Courts of Law as well as in this Court. It has been decided in K. B. that an Attorney and Solicitor has a right to bring an Action for his Bill, although the Order for Taxation is actually being proceeded on.

The VICE-CHANCELLOR:—

What the Court of King's Bench may do, does not bind this Court. I am bound by the Decision in *Ex parte Bellott*, and must make a similar Order.

(a) 2 Scho. & Lef. 110.

(b) 4 Mad. 379.

1828.
19th December.

Practice.
Dismissal.

Amendment
of a Bill, with-
out serving a
Subpœna, to An-
swer the Amend-
ments, will not
prevent the De-
fendant from
Dismissing the
Bill.

BRAMSTON v. CARTER.

THE Answer was filed on the 24th of April 1828. On the 24th of July following, the Plaintiff obtained an Order to amend his Bill; and afterwards amended it accordingly, but did not serve the Defendant with a Subpœna to answer the Amendments.

Mr. *Seton*, for the Defendant, now moved to dismiss the Bill, for want of prosecution. He cited *Cooke v. Davies* (a).

Mr. *Pitman*, for the Plaintiff, cited *Kendall v. Beckett* (b).

THE VICE-CHANCELLOR :

In *Kendall v. Beckett*, The Lord Chancellor was of opinion, that the Defendants, by delivering, to the plaintiff, their Office Copy of the Bill, for the purpose of its being amended, had waived their right to dismiss the Bill. That circumstance is not to be found in the present Case: and, inasmuch as no Subpœna to answer the Amendments was served, the amending of the Bill was not such a proceeding as would take away the Defendant's right, under the 16th of the New Orders, to dismiss the Bill.

(a) 1 Turn. & Russ. 309; S. C. 1 Russ. 153, in note.

(b) 1 Russ. 152.

WRIGHT v. TATHAM.

1828:
19th December.

THE Bill was filed to Perpetuate the Testimony of Witnesses to a Will. The Defendant's Answer had been put in, and Replication had been filed, but no Witnesses had been examined.

Practice.
Bill to Perpetuate Testimony.

Mr. *Duckworth*, for the Defendant, now moved to dismiss the Bill for want of prosecution. He cited, *Anon. (a)*.

A Motion to Dismiss a Bill to Perpetuate Testimony for want of prosecution, is irregular. The proper application is, that the Plaintiff may proceed within a given time, or may pay the Defendant his Costs.

Mr. *Walker*, for the Plaintiff, said that it was contrary to the practice of the Court to dismiss a Bill to Perpetuate Testimony, under any circumstances; but that the Defendant ought to move for his Costs as soon as the Witnesses were examined: That the Case cited would be a sufficient answer to the application, for, here, Replication had been filed.

Mr. *Duckworth*, in reply, said that the Defendant could not, in this Case, move for his Costs; as there had been no examination of Witnesses.

The *Vice-Chancellor* said that it appeared to him that the Motion was wrong in point of form (*b*), and refused it, with Costs.

(*a*) Amb. 237.

(*b*) It appears, from the following note of a Case, for which the Reporter is indebted to Mr. Turner, that the application which the Defendant ought to have made, in the above case, is

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WRIGHT

v.

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that the Plaintiff might be ordered to proceed with his Cause within a given time, or might pay the Defendant his Costs.

BARHAM v. LONGMAN.

May 20, 1825.

Bill to Perpetuate Testimony filed Michaelmas Term 1818. Two Witnesses examined, *de bene esse*, same Term. Answers filed Michaelmas Term 1819. Replication filed, Hilary Term 1822. Order to rejoin, 13th December 1823. Subpœna to rejoin served 15th January 1824. Defendants had not examined any Witnesses.

Mr. *Turner* moved, in their behalf, that the Plaintiff might be ordered to proceed to the examination of his Witnesses as prayed by his Bill, and procure such examination to be completed on or before the last day of Trinity Term, or, in default thereof, that he might be ordered to pay to the Defendants their Costs of Suit, to be taxed by one of the *Masters*. There was no Affidavit in support of the Motion. The Plaintiff did not appear. Sir *John Leach*, V. C. made the order upon Affidavit of Service.

WILLIAMS v. DAVIES.

THE Bill stated that the Defendant *Davies* had, for about ten years, rented of the Plaintiff an Inn at *Carmarthen*, at the rent of 50 *l.* per annum: that *Davies* had given, to the Plaintiff, Promissory Notes to the amount of 850 *l.*, for the Furniture and Stock in the Inn, and had also purchased, of the Plaintiff, considerable quantities of Malt: that, in 1827, the Plaintiff brought an Action, against *Davies*, in the Court of Great Sessions for *Carmarthen*, upon the Promissory Notes remaining unpaid, and obtained judgment for 600 *l.* and 5 *l.* 3 *s.* 3 *d.* Costs, and issued Execution thereon, to which a return of *Nulla Bona* was made: that, in August 1827, the Plaintiff distrained upon *Davies* for arrears of Rent, and, in Trinity Term 1828, *Davies* brought an Action, in K. B., against the Plaintiff, and also against the Sheriff and his Officers, alleging that the Distress had been illegally made: that, there having been some irregularity in the Proceedings, the Defendants in the Action allowed Judgment to go by Default, and, by an Order of one of the Judges of K. B., the venue in that Action (which had been changed) was brought back to the County of the Borough of *Carmarthen*, and *Davies* was to be at liberty to execute the Writ of Inquiry at *Hereford*, he undertaking to pay the extra Costs of the Witnesses on both sides, which the Defendants in the Action were to be at liberty to deduct: that the Damages in this Action were assessed at 600 *l.*: that the Plaintiff, *Williams*, had agreed to indemnify the Sheriff and his Officers (who also were

1829:
16th January.

Injunction.
Judgment.
Set off.

Motion refused to dissolve an Injunction, granted on Affidavit and Certificate, to restrain Execution on a Judgment obtained by the Defendant against the Plaintiff, the latter having obtained a Judgment to a greater amount against the former.

1829.

WILLIAMS

v.

DAVIES.

Defendants in this Suit) against the Damages and Costs in that Action: that *Williams* had applied, to the K. B., to allow him to set off the 605 *l.* 3 *s.* 3 *d.* against the Damages and Costs in *Davies's* Action, subject to the Lien of *Rogers*, *Davies's* Attorney, (who also was a Defendant in this Suit), but that the K. B. refused the application, on the ground that *Davies* had made an affidavit that there were other Accounts between him and *Williams*, but that, in fact, *Davies* was very largely indebted to *Williams*, on Balance of Accounts: that *Davies* was proceeding to Tax the Costs in his Action, and to enter up final judgment therein, and that he intended, immediately upon obtaining it, (which he would be able to do in a few days), to issue Execution in his Action: that *Davies* was in insolvent circumstances, and that *Williams* was unable to obtain payment of any part of his demand, except by setting off the same against the Damages and Costs recovered by *Davies*. The Bill then contained an offer, from the Plaintiff, to satisfy *Rogers's* Lien, and prayed that the 605 *l.* 3 *s.* 3 *d.*, and the other Sums due from *Davies* to the Plaintiff, or that the 605 *l.* 3 *s.* 3 *d.* alone, might be set off against the Damages and Costs recovered by *Davies*: that *Davies* might be decreed to acknowledge satisfaction of his judgment; that the necessary Accounts might be taken; and that *Davies* might be restrained from suing out Execution upon his Judgment. On the 6th of December 1828, The Vice-Chancellor, upon Affidavit of Merits, and Certificate of Bill filed, granted an Injunction in terms of the prayer.

Davies, before putting in his Answer, moved to dissolve the Injunction.

CASES IN CHANCERY.

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Mr. *Horne* and Mr. *Hayter*, in support of the Motion:—

1828.

WILLIAMS
v.
DAVIES.

An Injunction to stay Proceedings at Law cannot be granted upon Certificate and Affidavit, except in the case of a Warrant of Attorney, or in cases of Fraud, or where it is impossible to obtain the Common Injunction in time. *Franklyn v. Thomas* (a), *Rowe v. Wood* (b), *Turner v. Wright* (c), *Hine v. Fiddes* (d). The Plaintiff cannot bring himself within the principle of any of the exceptions to the Rule. He might have obtained the Common Injunction, or have given the Defendant notice of his application. These were counter judgments, and the Court of King's Bench refused to set off one against the other.

Mr. *Sugden* and Mr. *Jacob* appeared to oppose the Motion.

But The *Vice-Chancellor*, without hearing them, said that it appeared to him that the case was the same as if the Defendant's judgment had been paid, and he had been proceeding, at Law, to take the Plaintiff in Equity, in execution: that the judgment was, in point of fact, satisfied; and that although the Court of King's Bench would not, in point of form, allow the Plaintiff's judgment to be set off against the Defendant's, yet that it was right that it should be done in this Court.

Motion refused, without Costs.

(a) 3 Mer. 225.

(b) 2 Swanst. 234, in note.

(c) 1 J. & W 290.

(d) 2 Sim. & Stu. 370.

1829:
16th January.

*Practice.
Dismissal of
Bill.*

On the 28th of November Plaintiffs filed a Replication, and on the 29th, a Subpœna to rejoin, returnable immediately, tested on the 27th, but without obtaining an order for it. Afterwards the Defendants obtained an order to dismiss. Held, that the Subpœna was irregular, and a motion to discharge the order of dismissal, was refused.

BROWN v MOORE.

THE Plaintiffs filed a Replication on the 28th of November 1827: on the 29th they served a Subpœna to rejoin, returnable immediately. This Subpœna was tested on the 27th; and it appeared that it had been issued without any order having been obtained for a Subpœna returnable immediately. The Plaintiffs' Clerk in Court did not give notice, to the Defendants' Clerk in Court, of the Replication having been filed, until a few hours after the service of the Subpœna to rejoin. The Defendants, a week afterwards, obtained an order to dismiss the Bill for want of prosecution, as of course, under the 17th of the New Orders.

Mr. *Rose*, for the Plaintiffs, moved to discharge this Order, and contended that it was obtained upon a false allegation, the allegation being that the Plaintiffs had not served any Subpœna, and also that the Subpœna and service were regular; and, if not, that it was still a compliance with the order; and that the notice of filing Replication was not necessary, being only matter of courtesy.

Mr. *Jacob*, *contrà*, contended that notice of filing the Replication was necessary; that under the 17th Order, it was necessary that a Subpœna, effective for the purposes of the Cause, should be duly served; that the Subpœna ought not to have issued till after Replication, or without obtaining and serving an order for it, and

that an irregular Subpœna was to be treated as a nullity.
Powell v. Martin (a).

1829.

BROWN

v.

MOORE.

The VICE-CHANCELLOR:—

The question is, whether a Subpœna has been served within the meaning of the 17th Order. Here the Replication was filed on the 28th. The Subpœna issued on the 27th, and there was no order for it. A Subpœna so served is not a Subpœna within the Order.

Motion refused, with Costs.

(a) 1 J. & W. 292.

LEWIS v. BRIDGMAN.

A DEFENDANT, in his Answer to a Bill of Revivor, objected to the Plaintiff's right to revive the Suit. The Plaintiff, however, obtained an order to Revive, as of course. The Order was in the usual form, and recited that the Defendant had put in his Answer, and thereby submitted to the Suit being revived against him. The Defendant then moved to discharge the Order, as containing a false allegation.

The *Vice-Chancellor* said that the allegation was not a false one, as the putting in of the Answer was submitting to the Revivor; and that, if the Defendant wished to prevent the Revivor, he could not do it except by filing either a Plea or a Demurrer (a).

Mr. *Kindersley* in support of the Motion.

Mr. *Spence* opposed it.

(a) See *Harris v. Pollard*, 3 P. W. 348, and Mitf. 61.
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1829:
17th January.

Practice.
Revivor.

To prevent a Suit from being revived, either a Plea or Demurrer must be put in the Bill of Revivor; an Answer insisting that the Plaintiff has no right to Revive is not sufficient.

1829:

27th January
and
22d June.Pleading.
Parties.
Foreclosure.

The Mortgagor is a necessary Party to a Bill by a Second Mortgagee to redeem the first Mortgage, and Foreclose the Equity of Redemption.

FARMER v. CURTIS.

THE Bill was filed, by a Second Mortgagee, to redeem the First Mortgage, and Foreclose the Equity of Redemption; but the Heir of the Mortgagor (who was dead) was not made a Party to the Suit. The Bill alleged that the Plaintiffs had made diligent inquiry after the residence of the Heir of the Mortgagor, but were unable to discover where he resided, or whether he was living. On the Cause coming on to be heard, a preliminary objection was taken, because the Mortgagor's Heir was not a Party to the Suit.

Mr. *Turner*, for the Defendants, in support of the objection, cited *Fell v. Brown* (a), and *Palk v. Clinton* (b), and said that the consequence of making a Decree in this Suit, would be that the Defendants might have a New Bill filed against them, on the Heir coming within the Jurisdiction of the Court.

Mr. *Sugden*, for the Plaintiffs :—

The case of *Palk v. Clinton* has nothing to do with the present question. For, in that case, two Estates were included in the Mortgage, and the relief prayed related to one of them only. *Fell v. Brown* is the only case that applies: and there Lord *Thurlow* threw out merely some observations, without deciding the matter. My own impression is, that Decrees have been made in the absence of the Person entitled to

(a) 2 Bro. C. C. 276. (b) 12 Ves. 48, see pp. 53. 58.

the Equity of Redemption. But supposing that no such Decrees have been made, yet, as the case has never been decided in the other way, I must call on the Court to make a Decree. If the Court will not sustain a Bill, by a second Incumbrancer, to redeem the first, the first, though a bare Trustee, would hold against the Persons for whom he is a Trustee: for, subject to the Mortgage, the first Mortgagee is a Trustee for the second Mortgagee. If a Decree is made, the inconvenience falls on the Plaintiff, who undertakes to submit to it. For it may be held that the Mortgagor may have a right to take the account against the Plaintiff; but he cannot have a right to take it against any other Person. Supposing a Mortgagor to be an insolvent Person, he might be easily prevailed on to go abroad, in order to enable the first Mortgagee to hold the Estate. *Fell v. Brown* is no decision. It was only thrown out that the Party was expected to return soon, and the Cause was ordered to stand over.

1829.
FARMER
v.
CURTIS.

Mr. Turner, in reply:—

The Rule may be inconvenient or absurd, and may require the interference of the Legislature; but the settled doctrines of the Court are not to be overturned on a mere allegation that the Rule may be inconvenient. In *Fell v. Brown*, Lord Thurlow expressly refused to proceed until the Heir came within the Jurisdiction of the Court. Sir William Grant says: "In *Fell v. Brown*, that is laid down as Lord Thurlow's understanding of the Practice," &c.(c). Now it has been said that the First Mortgagee may keep the Estate:

(c) See 12 Ves. 58, 59.

1829.

FARMER

v.

CURTIS.

does not that argument apply to the Second Mortgagee also? He too may keep the Estate, and get it without any thing being due to him. For, in the absence of the Mortgagor, the Court does not decide whether any thing is due to him, or not.

The *Vice-Chancellor* said that the point was of great importance, and that he would consider of it.

Mr. *Sugden* then mentioned the case of the *Bishop of Winchester v. Beavor* (*d*), as having some bearing on the question.

Mr. *Pepys*, Mr. *James*, and Mr. *Ching*, were also Counsel in the Cause.

22d June.

On this day, The *Vice-Chancellor* ordered that the Cause should stand over, for want of Parties, and that the Plaintiffs should pay, to the Defendants, the Costs of the day (*e*).

(*d*) 3 Ves. 314.

(*e*) See *Rose v. Page*, post. 471.

KING v. TULLOCK.

THIS Suit was instituted, by the Plaintiffs, as Assignees of a Bankrupt. The Defendant, in his Answer, denied that the Plaintiffs had been duly authorized to commence the Suit (*a*). The Plaintiffs then filed a Supplemental Bill, stating that, in consequence of the Defence so made by the Answer, they had called a Meeting of the Creditors ; and that, a sufficient number not attending, they obtained the Consent of the Commissioners to the institution of the Suit ; and praying that they might have the benefit of the Suit, and be declared to be entitled to prosecute it. The Defendant demurred, generally, to the Supplemental Bill.

Mr. Sugden and Mr. Jacob, in support of the Demurrer, said that a Supplemental Bill could not be used to carry on a Suit which had been originally wrongfully instituted : that the office of a Supplemental Bill was, to remedy some defect in the original Bill, and not to supply the title to file the original Bill. *Ocklestone v. Benson (b)*, *Bozon v. Williams (c)*, *Adams v. Dowding (d)*.

Mr. *Wray*, in support of the Bill, said that it was a universal principle of Law that, whenever a subsequent Consent is given, it authorizes the previous Act, *ab initio*. *Humphreys v. Humphreys* (e), *Brown v. Higden* (f), *Jones v. Jones* (g). There is nothing in the 6 Geo. 4, c. 16, that makes it imperative that the Consent shall be obtained previously to the commencement of the Suit. But the Consent, when obtained, operates retrospectively.

a) See 6 Geo. 4, c. 16, s. 88. *(b)* 2 Sim. & Stu. 265.

(c) 2 Young & Jervis, 475. (d) 2 Madd. 53.

(e) 3 P. W. 349. (f) 1 Atk. 291. (g) 3 Atk. 110 & 217.

к к 3

1829 :
4th February.

*Bankrupt.
Supplemental
Bill.*

The Defendant in his Answer to a Bill filed by the Assignees of a Bankrupt, alleged that the Plaintiffs had not obtained the necessary consent to the institution of the Suit: upon which the Plaintiffs filed a Supplemental Bill, stating that, since the filing of the original Bill, they had obtained the necessary consent: Demurrer to the Supplemental Bill allowed.

1829.

KING

v.

TULLOCK.

The VICE-CHANCELLOR :—

The question is, whether the reason assigned by The Vice-Chancellor, in *Ocklestone v. Benson*, is not sufficient. The words of the Statute are abundantly plain. After stating what things may be done, it says : “ And no Suit in Equity shall be commenced, by the Assignees, without such Consent as aforesaid.”

If *Ocklestone v. Benson* is rightly decided, the only question to be considered is, whether the Act of the Commissioners can be considered as, *ab initio*, authorizing the Suit. The Statute, after having declared that no Suit shall be instituted without the Consent of the Creditors, provides that, if one-third in value of the Creditors shall not attend at the Meeting, the Assignees shall have power, with the Consent of the Commissioners, testified in writing under their hands, to do any of the Matters aforesaid. Now, one of the matters aforesaid is the commencement of a Suit; and, therefore, the sanction of the Commissioners is substituted for the Consent of the Creditors. Now, in the Case that I have referred to, it was decided that, without the prescribed Consent, the Assignees had no right to maintain the Suit. My opinion therefore is that, in compliance with the provisions of this Statute, the Demurrer must be allowed (*h*).

(*h*) In *Jones v. Yates*, (in Exch. 22d June 1829) the Bill was demurred to, because the consent required, by the 88th sect. of the New Bankrupt Act, to the institution of the Suit, had not been obtained. The Lord C. B. overruled the Demurrer, stating that he had consulted with the M. R. and the Vice-Chancellor, and that if those Learned Judges continued of the same opinion as they then entertained, his decision would be followed by them in similar cases. See Memorandum prefixed to 2d Young & Jervis's Reports.

ROSE v. PAGE.

THIS was a Bill of Foreclosure filed, by a second Mortgagee, against the Mortgagor and the third Mortgagee, in whose Deed the prior Mortgages were recited. The Defendants demurred, because the first Mortgagee was not a Party.

Mr. *Spence* in support of the Demurrer :—

The inconvenience arising from not making all the Mortgagees parties to a Bill of Foreclosure, is that there may be as many Suits, less one, as there are Mortgagees, by which the security of a subsequent Mortgagee will be diminished. This Suit will not enable the third Mortgagee to obtain his Money by redeeming the second ; but, if the first Mortgagee had been a Party, he might, in this Suit, have obtained either his Money or the Estate. If such Bills were permitted, some authority for them would be found in the Books ; but none such can be produced.

Mr. *Sugden* and Mr. *Loftus Lowndes* for the Bill :—

There is no reason for preventing a second Mortgagee from asserting his Rights against the Persons who come in under him. The case is different where a first Mortgagee omits to make the second Mortgagee a Party to the Suit ; for, by so doing, he gives the Right of Redemption to the third Mortgagee. There is no authority against the practice that we are supporting, and convenience is with it.

1829 :
4th & 9th
February.

Pleading.
Parties.

—
A second Mortgagee may file a Bill of Foreclosure against the Mortgagor and third Mortgagee without making the first Mortgagee a Party.

1829.

ROSE

v.

PAGE.

9th Feb.

After the argument was concluded, The *Vice-Chancellor* said that his opinion was against the Demurrer, but that he would consider the point.

The VICE-CHANCELLOR :—

The Bill, in this case, is filed, by a second Mortgagee, against the Mortgagor and the third Mortgagee, praying for an account and payment of what is due to the Plaintiff, or for a Foreclosure. The Defendants have demurred to it, because the first Mortgagee is not made a Party : and the question is, whether it is necessary that he should be a Party. It was admitted, in the argument, that there is no authority upon the subject. Convenience requires that such a Bill should be supported. All the subsequent Incumbrancers have taken subject to the first Mortgage ; and therefore they dealt on the footing that there were Securities on the Equity of Redemption.

I have not been able to find any authority upon the subject, but from a Manuscript Note of the late Sir *Samuel Romilly*, it appears to have been his opinion, that, to a Bill, by Incumbrancers upon an Estate, to have the Estate sold, it was not necessary to make Annuitants, having prior charges, Parties : and, as far as my own experience goes, I remember having prepared such Bills, and no objection was taken to them.

Demurrer overruled. (a)

(a) See *Farmer v. Curtis*, ante 466.

MACMAHON v. UPTON.

THE Plaintiff was the Chairman of a Joint-Stock Company, called *The Royal Irish Mining Company*. The Defendant was one of the Members of that Company. The Bill stated an Act of the 6th Geo. 4., by which certain Persons were empowered to work Mines in Ireland, and do other Acts connected therewith, for which purposes they were to be a Joint-Stock Company, by the name and description before mentioned ; and all Actions and Suits to be commenced, by or on behalf of the Company, against any Person or Persons, Body or Bodies politic or corporate, were to be commenced and prosecuted in the name of the Chairman, or of one of the Directors of the Company, as the nominal Plaintiff, for and on behalf of the Company ; and, in all proceedings in which, before the passing of the Act, it would have been necessary to state the Names of the Persons composing the Company, it was made sufficient, after the passing of the Act, to state the Name of such Chairman or Director, whose death or resignation was not to be an abatement of the Suit. The Bill then stated that, there being 241 Shares of the Joint-stock of the Company remaining on hand, the Board of Directors transmitted the Certificates of those Shares to the Defendant, *who was and is a Member of the Company*, with directions to sell them, on account of the Board of Directors, and for the benefit of the Company, the Board being willing to allow the Defendant the usual Commission in respect of his Agency : That the Defendant, accordingly, sold the Shares for a consider-

1829.
4th February.

*Joint-Stock
Company.
Pleading.
Parties.*

An Act of Parliament for forming a Joint-Stock Company authorized all Suits on behalf of the Company, against any Person, to be commenced in the name of the Chairman ; and, in all proceedings in which it would have been before necessary to state the names of the Partners, it was made sufficient to state the Name of the Chairman only : Held, that the Act did not authorize Suits to be commenced, by the Chairman, against one of the Partners without making the others Parties.

1829.

MACMAHON
v.
UPTON.

able Premium, which was received by him, on account of the Board of Directors, and for the use of the Company; but that he had refused to account for and pay to the Directors the Proceeds of the Sale. The Bill prayed for an Account of the Monies received, by the Defendant, in respect of the Shares, and for payment of the Amount, after deducting the Defendant's Commission.

The Defendant demurred to the Bill, because the other Members of the Company were not Parties to the Suit.

Mr. *Rose* and Mr. *Knight*, in support of the Demurrer, said that the Clause, in the Act, which authorized Suits to be commenced in the Name of the Chairman or one of the Directors, related to Suits between the Company and third Persons, and did not extend to Disputes between the Company and one of its own Members. *Van Sandau v. Moore(a)*. In that Case Lord *Eldon* says: "If the Members of these Bodies happened to quarrel amongst themselves," &c.

Mr. *Campbell*, in support of the Bill:—

The Clause that has been referred to applies directly to the Case of the Plaintiff: it is in the most general terms, and extends to all Actions and Suits whatsoever. *Davis v. Fisk(b)*. This Case is not between the Company and one of its Members, but between the Company and its Agent.

(a) 1 Russ. 441. 460.

(b) Gow on Partnership, 30 & 99; Cary on Partnership, 83; and Farren on Life Assurance, 128.

Mr. *Rose*, in Reply:—

The Bill alleges that the Defendant is a Member of the Company, and that the Shares were put into his hands on account of the Company of which he is a Member; and it, throughout, treats the Defendant as being a Member of the Company.

1829.
MACMAHON
v.
UPFON.

The VICE-CHANCELLOR:—

It is quite obvious that it was the intention of the Legislature, by the Act which constitutes this Society, to authorize Actions or Suits to be commenced, in the Name of the Chairman or of one of the Directors, against third Parties only, and not to enable the Society to sue one of its own Body without making the other Members Parties. It appears to me, remembering what Lord *Eldon* has said, and what has been done by the Legislature, that this is not a Case so protected as to render it unnecessary to make the other Members Parties to the Suit (c).

Demurrer allowed.

(c) See *Long v. Yonge*, ante 369.

1829 :
6th & 10th
February.

*Consolidation
of Suits.*

Motion by
Defendants in
Tithe Suits, in
all of which the
same Defence
was made, that
the Suits might
be consolidated,
refused.

THE WARDEN AND FELLOWS OF MANCHESTER COLLEGE *v.* ISHERWOOD.

THE Plaintiffs had filed Sixteen Bills for Tithes of the Parish of *Manchester*, against different Persons, amounting, altogether, to one hundred and sixty-three in number. All the Defendants made the same Defence, and set up seven Moduses. The Causes being at issue, a Motion was made by the Defendants, that the Causes might be consolidated, or that the first-mentioned Cause only might be prosecuted to a hearing, and that proceedings in the other Causes might be stayed, the Defendants in them undertaking to be bound by the Decree in the first Cause; or that it might be referred to the *Master* to inquire whether the said Causes, or some and which of them might not be consolidated, and that, in the meantime, all further proceedings in the said Causes might be stayed.

Mr. *Sugden* and Mr. *Duckworth*, in support of the Motion :—

It may be collected, from the judgment of Lord *Eldon*, C., in *Keighley v. Brown (a)*, that, where the Answers are filed, and there is, as in this case, only one Defence, the Court will consolidate the Suits. Here each Answer is in the same terms: seven Moduses are set up in each of them, and each of those Moduses will be proved by the same Evidence. At all events the Plaintiffs will be put to no inconvenience, if Decrees are made in all the Suits, but the Evidence is taken in

(a) 16 Ves. 344, 1 Fowler's Excheq. Pract. 214.

one of them only, and made binding upon all the Defendants.

1830.

MANCHESTER
COLLEGE
v.
ISHERWOOD.

Mr. *Agar* and Mr. *Parker*, for the Plaintiffs, opposed the Motion on the ground of the inconvenience that would arise from abatements happening from time to time, if the Suits were consolidated. They cited *Forman v. Blake (b)*.

The VICE-CHANCELLOR :—

In this Case several Bills have been filed, by the Plaintiffs, against several Occupiers of Land, claiming an account of Tithes in kind ; and a Motion has been made, on the part of the Defendants, that the several Suits may be consolidated. In the different Suits Answers have been filed.

The general rule is, that every Plaintiff shall be at liberty to conduct each Suit that he institutes, in what way he thinks best. At Law there is one exception: in the case of Actions upon Policies of Assurance: and the question is, whether, in Courts of Equity, any such exception has been allowed. In the Case of *Pyke v. Brock (c)*, in the year 1791, a Motion was made to consolidate seven Tithe Suits. In that case C. B. *Eyre* speaks of the practice as if it were common ; but the reason assigned for making the Order, was that no cause was shown. In *Keighley v. Brown (d)*, in 1809, a Motion was made, before Answer, to consolidate Tithe Suits. Lord *Eldon* is represented as stating his opinion that the Court of Exchequer did, very freely, consolidate Cases of this description ; but it appears that he mentioned the point to Baron *Thomp-*

(b) 7 Price, 654. (c) 3 Gwill. 1345. (d) 16 Ves. 344.

1829.
 MANCHESTER
 COLLEGE
 v.
 ISHERWOOD.

son, who had no idea that the Order was of course, in the Court of Exchequer, though, sometimes, made under special circumstances; and Lord *Eldon* refused to make any order. In 1819, in the case of *Forman v. Blake* (e), a Motion was made, after Answer, to consolidate Tithe Causes. The Chief Baron *Richards* said: "I never heard of an Order, in the course of my experience, for consolidating Causes in Equity, nor can I conceive upon what principle it can be done. There are many reasons why it should not; and, if it be the practice, it is extraordinary." And, upon referring to the *Registrar*, he said there was a Case wherein a similar application had been made, about twenty-four years ago, in about 1795, when the Court refused the application.

In 1820, in *Foreman v. Southwood* (f), a Motion was made to consolidate Tithe Suits, before Answer; and that was refused: and it is stated (g), that a similar application had been made, in the Case of *Davies v. Moseley*, in May of the same year, and refused with Costs. These are all the Cases in print. But in a Manuscript Case of *Kynaston v. Perry*, before Lord *Eldon*, in February and March 1826, a Motion was made to consolidate Tithe Suits before Answer, and refused. It is evident, therefore, that, neither in this Court, nor in the Court of Exchequer, has the Practice prevailed of compelling the Plaintiff to consolidate his different suits, against several Defendants: and the present Motion, being a mere experiment in opposition to practice, must be refused with Costs.

(e) 7 Price, 654. (f) 8 Price, 572. (g) See page 575.

LEAR v. LEGGETT.

ALEXANDER GOUDGE, by his Will, gave to his Wife, *Sarah Goudge*, and to *Jacob Cope*, and the Plaintiff, *Jeremiah Lear*, 23,333*l.* 6*s.* 8*d.* three per cent Consols, upon Trust to pay to his Wife, the Dividends thereof, for her life, and, after her decease, upon Trust to pay the Dividends thereof unto and amongst his Son and Daughters, *Alexander Goudge*, *Elizabeth*, the Wife of *Joseph Batho*, and *Sarah*, the Wife of *James Ebenezer Saunders*, in equal shares, for their respective lives; and after the decease of his Son and Daughters respectively, he directed that one third part of the Bank Annuities should be in Trust for, and should be paid and transferred unto and amongst all and every the Child and Children, *per stirpes*, and not *per capita*, of each and every his said Son and Daughters, who should live to attain the age of twenty-one Years, equally to be divided among such Children: and until the respective Shares of such Children should become payable, he directed that his Trustees should, from and after the several deceases of his Wife and the Parents of such Child or Children, receive the Dividends of such Child's Share, and apply the same for his or her Maintenance and Education, until his, her or their Share thereof should become vested and payable.

The Will then contained the following proviso:
 " Provided always, nevertheless, and my Mind and Will is that the several Provisions hereinbefore and hereinafter given for my Son and Daughters during

1829:
 7th February.

Construction.
Bankrupt.
Alienation.
Forfeiture.

Testator declared Trusts of Stock for *A.* for life, and, after his decease, for his Children, and declared that the provision he had made for *A.* should not be subject to any alienation or disposition by him, but if he should alienate, or attempt to alienate, it should operate as a forfeiture of the provision, and the same should devolve on the person next entitled.

A. who had several Children, became Bankrupt. Held, that his Assignees were entitled to his Life Interest.

1829.

LEAR
v.
LEGGETT.

their respective lives, shall not, nor shall any part thereof respectively, be subject to any Alienation or Disposition, by Sale, Mortgage, or otherwise, in any manner whatsoever, or by anticipation of the receipt ; and, in case they, or any or either of them shall charge, or attempt to charge, affect, or incumber the same, or any part or parts thereof respectively, then I do declare it to be my express will and meaning that any such Mortgage, Sale, or other Disposition or Incumbrance so to be made by them, or either or any of them, on his, her or their Life Annuity, Interest or Provision, shall operate as a complete Forfeiture thereof, and of all Benefit therein, during the remainder of their respective Natural Lives, and the same shall devolve upon the next Successor, or Person or Persons in Expectancy, as if he she or they were then actually dead." The Testator appointed his Widow and *Jacob Cope*, and the Plaintiff, his Executors. The Testator died about the Year 1806. The Widow, *Sarah Goudge*, died in 1821 ; *Alexander Goudge*, the Son, was then of age ; and, on the 5th of March 1828, a Commission of Bankrupt issued against him, under which he was found a Bankrupt ; and the Defendants, *Leggett, Peache* and *Birkett* were chosen his Assignees. *Alexander Goudge*, the Son, had eight infant Children, who were also Defendants.

The Bill was filed by the Trustees of the Stock. The question raised by it was, whether the Assignees were entitled to the third part of the Dividends of the Stock, during the remainder of the life of *Alexander Goudge*, the Son, or whether, upon his Bankruptcy, his Children became entitled to his share of the Stock, in possession.

Mr. Koe, for the Plaintiffs.

1829.

Mr. Sugden, for the Assignees:—

LEAR
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The question in cases of this nature is, whether the act upon which the Devolution of Interest is to take place, is to be done by the Party, or whether he is to be passive, or may be passive. The *King v. Robinson* (a). That was a Case in which an Annuity provided for the personal support of the Testator's Son, was given over on his doing any act to charge or alienate it; and the Chief Baron held that a positive act must be done by the Annuitant, and that a seizure of the Annuity, under his Outlawry, did not fall within the words of the Will so as to create a Forfeiture. It may be useful to state that, in the Judgment in that Case, the Marginal Note in *Dommett v. Bedford* (b) is said to be entirely incorrect. Now Bankruptcy is an Alienation, not by the voluntary act of the Legatee, but by operation of Law. It has been determined that there is a distinction between Insolvency and Bankruptcy, because, in the former case, the Party makes the Assignment, and it is by his own voluntary act that he has the benefit of the Insolvent Act. *Shee v. Hale* (c), *Wilkinson v. Wilkinson* (d). But the becoming Bankrupt is Compulsory. It is clear Law that no Forfeiture can take place, except by an act which is strictly within the clause creating the Forfeiture. Thus, in cases of Estates Tail, where it was declared that the Estates should go over, as if the Tenant in Tail were dead, no effect was given to the Proviso, because the Estate would not go over unless the Tenant in Tail died without Issue, and the Court would not add a word to the Proviso. Now

(a) Wightwick's Rep. 386.

(b) 6 T. R. 684.

(c) 13 Ves. 404.

(d) Coop. 259, and 3 Swanst. 515.

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has this Annuitant charged or attempted, within the words of the Proviso in this Will, to charge, affect, or incumber his Annuity. He has been merely passive; and the Law has transferred his Property to the Assignees.

Mr. *Horne* and Mr. *Knight*, for the Children of *Alexander Goudge*, the Son :—

The Law does not compel any Person to commit an act of Bankruptcy; therefore, Bankruptcy is a voluntary act. In *Dommett v. Bedford* (e) the term was alienation only, here the expressions are much stronger; and, if *Dommett v. Bedford* stands on any principle, the same principle applies to the present case with much greater force. There the alienation was to cause a Forfeiture, which is always construed strictly, here it gives effect, merely, to a limitation over. In *Cooper v. Wyatt* (f), the words of the Proviso were not so large as they are in the present case, and yet it was held that the Interest of the Son did not pass to his Assignees, on his becoming Bankrupt; but that his Children became entitled. The event which the Testator meant to provide against was, an alienation of the Annuity, under any circumstances, whereby it would become no longer applicable to the personal support of the Son and his Family.

The VICE-CHANCELLOR :—

This is not a case in which I can hold, on the words of this Proviso, that the limitation over took effect; and it appears to me that the Cases, which have been cited in support of the Children's Claim, do not warrant the argument in their favour.

(e) 6 T. R. 684, and 3 Ves. jun. 149. (f) 5 Madd. 482.

The words of this Will must, as in all cases of the like nature, be construed with great strictness. In *Dommett v. Bedford*, the Annuity on which the question arose, was given by reference to the Annuity given to the Niece. There the Testator gave the Annuity to his Niece, *Anne Ireland*, and declared that the same should, from time to time, be paid to herself only, and that a receipt under her hand, and no other, should be a sufficient discharge for the payment thereof; his intent being that the said Annuity, or any part thereof, should not be alienated for the whole term of her life, or for any part of the said term; and that, if the same should be so alienated, the said Annuity should immediately, thereupon, cease and determine. The Testator does not say that, if the Annuity was alienated by the act of the Party, it should cease; therefore that is not a case in which the benefit was to go over on an act done by the Party. The case of *Cooper v. Wyatt* is totally different from the one now before me. The *Vice-Chancellor*, in giving Judgment, calls in aid of his construction of the Proviso, the mode in which the benefit is given to the Nephew, and says: "Here is no gift to the Nephew other than a direction that the Payment should be made into his proper hands, but not to his Assigns, and for his own use and benefit; which expressions naturally import an intention of personal enjoyment by the Nephew, and the exclusion of all who attempt to claim through him; and, in this sense, the words 'his Assigns', will as well comprehend the Assignees by operation of Law, as the Assignees by his own act." The judgment, therefore, did not rest on the Proviso alone, but on the Proviso taken in connection with the limited words of the gift. [His Honor here read that part of the Will in this Case in

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which the Trusts were declared, and then proceeded.] Now here is a gift totally unlike the gifts in *Dommett v. Bedford*, and *Cooper v. Wyatt*. The Testator then directs that the gift shall not be subject to any alienation, or disposition by Sale, Mortgage, or otherwise, in any manner whatsoever. Now these words alone do not create any Forfeiture. The Testator then declares that, in case his Son or Daughters should charge, or attempt to charge, affect, or incumber, &c. Now all these words refer to a voluntary act of the Party, and point at a voluntary alienation; and I am of opinion that no act has been done, in this case, which can be said to be a voluntary alienation or attempt to alienate; and I must, therefore, declare that the Assignees are entitled to the Life-interest of *Alexander Goudge*, the Son, in the fund in question (g).

(g) See *Brandon v. Robinson*, 1 Rose, 197; S. C. 18 Ves. 429; 1 Swanst. 481, n.; *Graves v. Dolphin*, 1 Sim. 66.

MORSE v. MORSE.

SIDAY HAWES made his Will, dated the 20th of March 1827, and, after making certain specific Bequests, and giving an Annuity to his Wife, proceeded as follows: "I give and bequeath unto my Daughter, *Anne Morse* and her Children, for their sole use and benefit, 5,000*l.*; 3,000*l.* thereof to be paid within one year after my decease, and the other 2,000*l.* within one year after the decease of my Wife: and I do appoint Mr. *John Courage*, and my Sons *Siday Hawes* and *Robert Hawes*, Trustees, for the said Sums of Money, for my Daughter *Anne Morse* and her Children. I devise and bequeath, unto my Daughter *Elizabeth Hawes*, and her Heirs, 7,000*l.*; 5,000*l.* thereof to be paid within one year after my decease, with 5*l.* per cent Interest from my decease upon the said 5,000*l.*, and the other 2,000*l.* to be paid within one year after the decease of my Wife, *Elizabeth Hawes*. I devise and bequeath, unto my Daughter *Susan Courage* and her Children, for their sole use and benefit, 6,000*l.*; 4,000*l.* thereof to be paid within one year after my decease, and the remaining 2,000*l.* to be paid within one year after the decease of my Wife: and I do appoint Mr. *John Morse*, and my Sons *Siday Hawes* and *Robert Hawes*, Trustees, for my Daughter *Susan Courage*, and her Children, for the said Sum of 6,000*l.*" The Testator died on the 6th October 1827, and left surviving him his Widow, and his Daughters *Anne Morse* and *Susan Courage*, and nine Children of *Anne Morse*, all Infants, and two Children of *Susan*

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11th February.

Will.
Construction.

Testator gave to his Daughter and her Children 5,000*l.*, 3,000*l.* to be paid in one year after his decease, and 2,000*l.* after the decease of his Wife, and appointed *A. B.* Trustee of those sums for his Daughter and her Children. The Court declared the 5,000*l.* to be in Trust for the Daughter for life, and after her decease for all her Children, whether born in the Testator's lifetime or after his decease.

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Courage, who were also Infants. On the 19th of July 1828, another Child was born to *Anne Morse*. The Bill was filed by the Trustees and Executors of the Will, against Mrs. *Morse* and Mrs. *Courage* and their Children, in order to obtain the opinion of the Court upon the Bequests to those Parties.

The Bill prayed that the Rights and Interests of the Defendants to the Legacy of 5,000*l.*, bequeathed for the benefit of *Anne Morse* and her Children; and to the Legacy of 6,000*l.*, bequeathed to *Susan Courage* and her Children, might be declared by the Court.

Ann Morse, by her Answer, claimed to be entitled, for life, to the Interest of the whole of the Legacy of 5,000*l.*, given unto or in trust for her and her Children, namely, to the Interest of 3,000*l.*, part of that sum, from the end of one year after the decease of the Testator, and to the Interest of 2,000*l.*, the remainder, from the decease of the Testator's Widow. *Susan Courage* made a like Claim, in her Answer, as to the Legacy of 6,000*l.*

The Children of Mrs. *Morse*, born in the Testator's life-time, and the two Children of Mrs. *Courage*, claimed, by their Answers, to be entitled, equally, as Tenants in common with their Mothers, to absolute vested Interests in the 5,000*l.* and 6,000*l.* respectively.

The Child of Mrs. *Morse* born after the Testator's death, claimed the same Interest, under the Will, as his Brothers and Sisters should, in the opinion of the Court, be entitled to.

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Mr. *Teed*, for the Plaintiffs.

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Mr. *Knight*, for the Defendants Mrs. *Morse* and
Mrs. *Courage*.

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Mr. *R. D. Thomson*, for the Child of Mrs. *Morse*
which was born after the Testator's decease.

Mr. *Milford*, for the other Defendants, cited *Cooper*
v. *Thornton* (a).

The VICE-CHANCELLOR :—

It is clear that the Testator did not intend an immediate Payment of the two Legacies ; and there would be an inconsistency with respect to them if the Mothers did not take Life Interests, for then different Classes of Children would become interested in the two Portions of the Legacies. I must therefore put such a construction upon the Bequests as will make all the Children Participators. Declare the Legacy of 5,000*l.* to be in trust for Mrs. *Morse* for her life, and after her decease, for all her Children ; and the Legacy of 6,000*l.* to be in trust for Mrs. *Courage* and her Children, in like manner.

(a) 3 Bro. C. C. 96 & 186.

PICKERING v. HANSON.

1899:
1st Feb.
and 2d March.

Practice.
Amendment.

Leave given
to amend a Bill
without preju-
dice to an In-
junction obtain-
ed on the filing
of the Bill.

IN this Case an Injunction had been obtained upon certificate of Bill filed, and Affidavit of Merits, and the Answer had been put in.

Mr. *Lovat* now moved for leave to amend the Bill without prejudice to the Injunction; and cited *Pratt v. Archer* (a).

Mr. *Loftus Lowndes*, for the Defendant, cited *Pemfold v. Stoveld* (b).

The *Vice-Chancellor* said that he would inquire into the practice.

2d March. On this day His *Honor* said that it was the clear opinion of the *Registrar* that, when an Injunction had been obtained on Affidavit of Merits, the Plaintiff might amend his Bill without prejudice to the Injunction.

Motion granted.

(a) 1 Sim. & Stu. 433. The report of this case is erroneous in stating that the common Injunction had been obtained. The fact is, that the Injunction that was granted, in that case, was to stay waste, upon certificate of Bill filed and Affidavit of Merits. The profession, however, can not be misled by the error, as the Vice-Chancellor, in his judgment, states what the practice of the Court is as to Amendment, both in the case of a Special and of a Common Injunction.

(b) 3 Madd. 471.

TOMLINSON v. LYMER.

THIS was a Suit for Tithes of Hay, Milk, Calves and Agistment. The Defendants, in their Answers, admitted that they had in their Custody several Receipts for Moduses and Compositions given to them by the Plaintiff and his Predecessors, but submitted that they ought not to be compelled to produce them, inasmuch as some of the Receipts were given for Compositions for Tithes of Corn (which were not claimed by the Bill), and the others were Evidence for the Defendants, and not for the Plaintiff.

Mr. Rolfe, for the Plaintiff, now moved that the Defendants might be ordered to produce the Receipts. He said that it was material to the Plaintiff to inspect them, as it might appear, from them, that the alleged Moduses had varied, or that some of the Titheable Articles which were stated to be covered by the Moduses, were not, in fact, included in them. He cited *Evans v. Richard* (a), *Corbett v. Hawkins* (b).

Mr. Spence, for the Defendants, said that the Plaintiff could not be entitled to have the Receipts in question produced, as they were the Defendants' Evidence, and because they were given by the Plaintiff, and therefore could not be admitted as Evidence for him. He referred to *Bligh v. Berson* (c), and *Firkins v. Lowe* (d).

1829:
12th Feb.
and 2d March.

Production of Documents.

A Plaintiff in a Tithe Suit is not entitled to a production of Receipts for Moduses and Compositions, given to the Defendants by the Plaintiff and his Predecessors, some of those Receipts relating to Tithes not sued for, and the others being Evidence for the Defendants, and not for the Plaintiff.

(a) 1 Swanst. 7.

(c) 7 Price, 205.

(b) 1 Young & Jer. 421.

(d) 13 Price, 193.

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LYMER.

The VICE-CHANCELLOR:—

As to those Receipts which were given for Compositions for Tithes of Corn, the Plaintiff can have no right to see them, as they relate to matters not in dispute: and, as to those that do relate to the matters in dispute, on the authority of *Bligh v. Berson*, and *Firkins v. Lowe*, I shall make no Order.

27th February.

STONE v. MAULE.

Will.
Construction.

Bequest to *H. D.* for his own use, and in case he should die in the Testator's lifetime, or afterwards, without having any Child or Children, then over. *H. D.* survived the Testator, and died without having had a Child: Held, that the Gift over took effect.

A TESTATOR bequeathed the Residue of his Personal Estate to *H. Dodderidge*, for his own use and benefit; and, in case *H. Dodderidge* should happen to die in his lifetime, or afterwards, without having any Child or Children, then the Testator gave the Residue to his Nephew and Nieces, *John*, *Elizabeth*, and *Mary Stone*.

H. Dodderidge was an Illegitimate Child. He survived the Testator, and died without ever having had any Child.

The question was whether, under this Bequest, the Residue vested, absolutely, in *H. Dodderidge*: in which case the Crown would have been entitled to it, he having died without issue; and the *Attorney-General* was, in consequence, made a Defendant in the Cause.

Mr. *Wray*, for the *Attorney-General*:—

The failure of Children is not, in this case, confined to the death of the Legatee. A devise of Real Estate to *A*, and to his Children, *A*. having no Child at the time,

gives an Estate Tail to *A.* (a). It is now settled that there is no difference between Estates by implication, and those that are expressly given. *Chandless v. Price* (b). In that case Lord *Loughborough* says, "I agree," &c. There is no distinction between the expressions "dying without Children," and "dying without having Children;" and, as the former words will give an Estate Tail, why should not the latter have the same effect. Here the Residue is given, in the first instance, to *H. Dodderidge*, absolutely; the words "without having any Child or Children," imply an intention that the Children were intended to benefit by the Bequest. *Newton v. Barnardine* (c), *Barlow v. Salter* (d).

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v.

MAULE.

Mr. *Sugden* and Mr. *Barber* appeared for the Nephew and Nieces of the Testator, but were not required to argue the Case.

THE VICE-CHANCELLOR:—

It has been assumed, in the argument for the Crown, that the words "without having any Child or Children" are to be taken as synonymous with the expression "without Issue." But why am I to put a construction upon those words, which they do not strictly bear, for the purpose of defeating the intention of the Testator. The question is, not what is the effect of words creating an Estate Tail, but of words making a Gift over. It appears to me that I should defeat the Testator's intention, in this case, if I did not hold that the Gift over took effect on the death of *H. Dodderidge*.

(a) See 6 Rep. 17.

(b) 3 Ves. 99, see 101, 102.

(c) Moor. 127.

(d) 17 Ves. 479.

1829:

21 Feb.

Legacy-Duty.

An Annuity was given by a Will, clear of all deductions, and was directed to be paid out of certain sums of Stock standing in the Testator's Name: Held, that it was not subject to the Legacy-Duty.

DAWKINS v. TATHAM.

RANDAL WALWORTH, by his Will, duly executed for devising Real Estates, gave all his Real and Personal Estate to his Executors, in trust, among other things, out of the Dividends and Interest of the Trust Monies to pay, to his Daughter, *Jane Dawkins*, the Wife of *Nathaniel Dawkins*, for her separate use, for her life, an Annuity of 46 *l.*, clear of all deductions whatsoever, by half-yearly payments; the said sum of 46 *l.* per annum to be paid out of 1,000 *l.* New 4 per Cent Annuities, and 6 *l.* per annum Long Annuities, then standing in his name, in the books of the Bank of England.

The Bill was filed, by *Jane Dawkins* and others, against the Executors, for an account of the Personal Estate, and to have the Annuity secured.

The Answer of the Executors admitted Assets for the payment of the Annuity, and that the Stock on which it was charged was standing in the name of the Testator.

A Motion was made, by the Plaintiffs, for a transfer of the Stock into Court. The question was, whether the Executors were entitled to deduct the Legacy Duty which had been paid by them.

Mr. *Wigram*, for the Motion, cited *Barksdale v. Giliat* (a).

(a) 1 Swanst. 562.

Mr. *Seton*, for the Defendants, distinguished the Case of an Annuity from that of a Legacy, and submitted that, in the Case of an Annuity, the words "clear of all deductions," originally referred to the payment of Land Tax, and were, therefore, only applicable to the Annuity as a charge upon the Real Estate, and cited *Brewster v. Kitchell* (b).

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TATHAM.

But the Court held that the Legacy Tax could not be deducted (c).

(b) 1 Salk. 198; S. C. 1 Lord Raym. 317.
(c) *Ex Relatione*, Mr. *Seton*.

BENSON v. WHITTAM.
HEMING v. WHITTAM.

1829:
21st February.

JOHN BENSON, late of *Peterborough*, deceased, by his Will, dated the 30th of May 1822, gave to *Sarah Acres* and *Mary Parsons*, all his Household Furniture, Plate, Watches, Linen, China, Notes, Bonds, Ready Cash, Live Stock and Carriages, and all Monies due and owing to him (except what Money might be in the hands of any Banker, and 1,000*l.* Lent by him to the Trustees for repairing *Peterborough Church*, which he bequeathed to his Brother *Arthur Benson*), together with the Lease or Leases of any Dwelling-house, Land,

Will.
Construction.
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from time to time, and with his knowledge paid them to his own Bankers as his own monies; but *J. B.* had no concern with *A. B.*'s Bankers, nor did they know that he was interested in the Monies paid by *A. B.* *J. B.* bequeaths all his Money in the hands of any Banker: Held that his Balance at his own Banker's, and also his share of *A. B.*'s Balance, will pass; and that Evidence is admissible to show that he so intended.

J. B., at his death, had a balance due from his Banker, and was also entitled to a share of the balance due to *A. B.*, from his Banker, *A. B.* having received Monies for him

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or Houses that he might have : and he appointed his Brother *Arthur Benson*, and *George Whittam*, his Executors.

A Bill having been filed, by *Arthur Benson*, to have the Trusts of the Will carried into execution, and the rights of the Parties claiming to be interested in the Testator's Estate ascertained and declared, the Court referred it to the *Master*, to inquire and state whether the Testator had, at his death, any and what Sum or Sums of Money in the hands of any and what Bankers or Banker, and of what the Balance in the hands of Messrs. *Drummond*, the Bankers, standing, at the Testator's death, to the account of *Arthur Benson*, was composed ; and whether any and what part of such Balance belonged to the Testator ; and the *Master* was to be at liberty to state any circumstances, specially, as to *A. Benson's* account with Messrs. *Drummond*, and as to any dealings and transactions between the Testator and *A. Benson*.

In pursuance of this Decree the *Master* made a separate Report, by which he found that *John Benson*, the Testator, had been one of the Committee Clerks to the House of Commons, and formerly resided in *Westminster*, but, for some years before his death, which happened on the 3d of April 1827, had retired to *Peterborough* : that he kept an account with Messrs. *York & Co.*, of *Peterborough*, as his Bankers, and, at his death, had a balance of 2,428 *l.* 11 *s.* 3 *d.* in their hands : That on the day of *John Benson's* death, there was a balance in the hands of Messrs. *Drummond*, to the credit of *Arthur Benson*, amounting to 4,554 *l.* 17 *s.* 3 *d.* : that *John Benson* did not keep any account with Messrs.

Drummond, and that there was no distinguishing mark in their Books to denote Money in their hands belonging to *John Benson* in the name of *Arthur Benson*, but that *Arthur Benson* sometimes gave directions to the Clerk, when he paid in Money, to enter the amount in two equal sums, though the whole was paid in at the same time, and not (as was usual in the common course of business) as one sum; and, at other times, *Arthur Benson* directed the Money, paid in by him, to be entered, in Messrs. *Drummond's* Books, as received of *John Benson*: that *Arthur Benson*, after the retirement, to *Peterborough*, of *John Benson*, frequently settled, and received for him, his Salary and Fees, as a Committee Clerk to the House of Commons, and, also, his Dividends at the Bank of England, and, on most occasions, when *John Benson* did not direct any other application, or was in waiting for a suitable investment, *Arthur Benson* used to pay in, and mix the Monies so received for *John Benson*, with his, *Arthur Benson's*, own Monies at Messrs. *Drummond's*; and that *John Benson* was apprised of, and sanctioned and approved that mode of dealing; and, particularly, in a letter to *Arthur Benson*, dated the 16th of July 1821, he wrote, as follows, concerning his Committee Fees of that year which had been received for him by *Arthur Benson*, and paid into *Arthur Benson's* account with Messrs. *Drummond*: "I am, thank God, getting better, and much gratified that our Committee Fees have turned out so favourably. As I am not in want of Cash, at present, my proportion may remain at *Drummond's*, till I come to Town." And the Testator having been, subsequently, informed, by different letters from *Arthur Benson*, that the latter had received other year's Committee Fees and Salary, and, also, Bank Dividends, for him, and lodged the amount

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at Messrs. *Drummond's*, wrote, to *Arthur*, as follows, in a letter, dated the 19th of January 1825: "With regard to my Money that lies idle at *Drummond's*, and the Bank, should my health permit, I propose coming up earlier than usual next Spring, and will then determine respecting it:" That the first of the letters was written before the date of the Testator's Will, but after he was made acquainted with the fact that the Monies received for him by his Brother were, occasionally, paid into his Brother's account at Messrs. *Drummond's*: That although Messrs. *Drummond* were not instructed to distinguish, in any manner, between the Sums of Money, from time to time, paid into *Arthur Benson's* account with them, as to which of such Monies were his, *Arthur Benson's*, own, and which might be Receipts of his, for the Testator; yet that, from various authentic sources of information, derived from Memorandums of Account of *Arthur Benson* himself, or marks occasionally made by him in the Pass-Books, and from clear evidence of the nature and manner of his dealing with the Testator's affairs, all the items in the Pass or Banking Books of *Arthur Benson*, relating to the Testator, whether Receipts for him, or Payments over to him, or to his use, were, in fact, fully traced and made out, so that no question remained between the Parties as to the items themselves. The Report concluded by stating that the Banking Account with Messrs. *Drummond* was, at all times, the separate and exclusive account of *A. Benson*, and that *John Benson* never exercised or claimed any power over the same, and that Messrs. *Drummond* never had any privity or concern, with *John Benson*, with regard to the account, or any notice that *J. Benson* was interested therein.

Arthur Benson having died pending the Suit, a Petition was presented, by his Executors, praying that the Report might be confirmed, and that it might be declared that the sum of 3,019 *l.* 18 *s.* 2 *d.* of the Monies of the Testator *John Benson*, was in the hands of Messrs. *Drummond* the Bankers, at his death, and that the Petitioners might be declared entitled, in right of *A. Benson*, to such sum of 3,019 *l.* 18 *s.* 2 *d.*, as bequeathed, to *A. Benson*, by *John Benson*, under the description of Money due or belonging to *J. Benson* in the hands of any Banker.

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Mr. Sugden, Mr. Knight, and Mr. Swann, for the
Executors of *Arthur Benson*:—

In construing Wills, parol Evidence is admissible to ascertain what is the thing given. You may also inquire into all the circumstances of the Testator, and of his Property, at the time of making his Will, in order to get at the real meaning of the words : not to put a construction on the words contrary to what they import, but to find what they really mean. Here the Testator uses the expression : “Money in the hands of any Banker,” and he couples it with a Debt due to him. Now Money at a Banker’s has been held to pass under a Bequest of Debts. The two Brothers were Clerks in the House of Commons. *Arthur* received *John*’s Fees, at the same time as he received his own ; and they were exactly of the same amount. *Arthur*, when he paid a sum of 2,600 *l.* into *Drummond*’s, desired that there might be two entries, in their Books, of 1,300 *l.*, instead of one entry of 2,600 *l.*; what could he mean by that, except to keep his Brother’s Money distinct from his own. In the Banking-book, *Arthur* marked, some of the Sums paid in, with his own initials,

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and others with those of his Brother, and, in his own Books, kept distinct accounts of his own and of his Brother's Money. Every Sum that had been paid in on account of *John*, was afterwards applied for his use. In every instance the Testator's Money was applied according to his directions.

Mr. Horne and Mr. Barber for Sarah Acres and Mary Parsons —

Evidence cannot be gone into, for any purpose, except to ascertain what the Property is on which the Will is to operate. The Will cannot be explained, as to the Testator's intention, by any papers that are not testamentary, but must speak for itself. The Testator had a Banker of his own, with whom he kept a regular Account, and in whose hands he had a large Balance. Messrs. *Drummond* were not his Bankers. The Account kept with them was *Arthur's* Account. The Money was all paid in, by *Arthur*, as his own Money; and was not ear-marked so as to show that it was *John's*. At one time *Arthur* had not Money enough in *Drummond's* Bank to answer what he had received for the Testator. And, if *Arthur* had over-drawn his own Money, he could not have said, to the Messrs. *Drummond*: "You have no right to take Credit for the remainder of the Money, against me, because it is not my Money, but my Brother's." If a Bill had been filed for the Administration of *Arthur's* Estate, the Money at *Drummond's* would have formed part of his Assets. If an Agent writes to his Principal, and says that he has paid money belonging to the Principal, into his own Banker's, the Principal cannot demand it, unless it is paid in to the Principal's separate Account. Here there was no

appropriation of *John's* Money. *Arthur* mixed it with his own. The Bankers were not accountable to *John*; and he could not have sustained an Action against them. They could not have paid a single Shilling of the Money to *John Benson*, or to his Order. *Arthur* stood in the relation of Debtor to *John*, and that relation was not altered by *Arthur* not keeping the Money in his pocket, but paying it into a Banker's with his own Money. It is absurd to say that, if persons owed the Testator Money, and they kept their Money in a Bank, that Money would pass by this bequest. *Arthur* did not discharge himself by paying the Money into *Drummond's*. If they had failed, *Arthur* would still have remained liable to *John*. Suppose that *Arthur* had died Insolvent, could the Executors of *John* have intercepted this Money as against his general Creditors. Unless that part of *Arthur's* Balance, which arose from the Monies received for *John*, can be strictly said to be the Money of *John*, it is a Debt, and, if it be a Debt, it is expressly given to our Clients. If the Court comes to that decision, the words of the Exception will still operate upon the Balance in the *Peterborough* Bank.

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Mr. *Purvis* appeared for the Next of Kin of the Testator, but did not argue the Case.

The VICE-CHANCELLOR:—

The only point to be considered here is, what the Testator meant by the terms which he has used in his Will: and, admitting that the first words of the Bequest would have given to Mrs. *Parsons* and Miss *Acres*, all the Money that was due and owing to the Testator, the question is, whether the exception of what Money might be in the hands of any Banker,

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will not comprehend, not only that Balance which was due to him from his Banker at *Peterborough*, but also such sum of Money in the hands of Messrs. *Drummond*, as, regarding the mode of dealing between himself and his Brother, was considered, by the Testator, as his own Money at *Drummond's*.

It is, I think, quite clear, from what is stated upon the *Master's* Report, that *John* did actually look upon the Money at *Drummond's*, that is, that portion of it which his Brother had received for him, and afterwards paid into his own account, as his (*John's*) own Money. He has expressly referred to it in the Letters that are stated in the Report, one of which was written before, and the other after the date of the Will. In the former of those Letters he says: "As I am not in want of money at present, my proportion may remain at *Drummond's*, until I come to Town." It is impossible to say that, at that time, the Money which his Brother owed to him, in consequence of having received his Fees and paid them into *Drummond's*, was not considered by him as his own Money. Then, in the Letter of the 19th of January 1825, he says: "With regard to my Money that is idle at *Drummond's* and the Bank, should my health permit, I propose coming up earlier than usual next Spring, and will then determine respecting it."

It appears that the course of dealing pursued by *Arthur* with respect to the sums of Money which he received on account of *John*, was either to pay debts which *John* owed in London, or to purchase Stock for him. Then the question is, whether the words of the Exception are not applicable, not only to the Money

in the hands of the Testator's own Banker, but also to that proportion of the Money in the hands of *Arthur's* Banker, which, as between *Arthur* and *John*, was admitted by *Arthur*, and was considered by *John*, to be *John's* own Money in the hands of *Drummond's*.

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Now any article of Property may pass by words of description which do not legally and strictly describe it, provided that it can be made out that the words do, in the sense in which the Testator used them, describe what he meant. Where Legatees are mentioned in a Will by Names which they never, in point of fact, had ; yet they will take, upon its being proved that the Testator intended them. So if a Testator gives his *Colton* Estate, it has been decided that whatever he is shown to have considered as part of his *Colton* Estate, will pass ; but if he gives his Estate of *Colton (a)*, then you can only inquire what Lands he had in the district called *Colton*.

I cannot help thinking that the Testator used the expression "any Banker," for the purpose of comprehending, not only the Money that would be in the hands of his *Peterborough* Bankers, but also the Money that would be in the hands of Messrs. *Drummond*, in the way in which it appears to have been ; and I, therefore, think that that Money does pass by those words.

(a) See 1 Powell on Devises, edited by Mr. Jarman, p. 470, note. This Work appears to be one of the most useful that, of late years, has been given to the Profession.

1828 :
27th February.

Appointment.

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A. having a power to appoint 10,000 *l.* amongst his younger Children, appoints it to them equally, reserving to himself a Power of Revocation as to 5,000 *l.*, which he afterwards irrevocably appoints to *E.*, one of the Children, in consideration of her having agreed to apply part of it in payment of his Debts. Afterwards *A.*, by a Deed, to which *E.* is also a Party, revokes, with her consent, the last appointment, as to 2,500 *l.*, and, in pursuance of all Powers, appoints that Sum to a Child by a second Marriage, and confirms *E.*'s title to the remainder under the former appointment. Held, that the appointment of the 5,000 *l.* being void, the appointment of the 2,500 *l.* must also fail.

BY Indentures of Lease and Release, of the 11th and 12th of February 1771, Estates, in the Counties of *Cambridge, Worcester and Gloucester*, were conveyed to *Thomas Martin* the Elder, for life, with Remainder to his First and other Sons, in tail male : and *Thomas Martin* the Elder, was empowered to demise any part of the Estates, to Trustees, for a term of years, to commence from his death, upon Trust to raise 10,000 *l.* for the portion or portions of all and every or any of his Child, or Children, other than an eldest or only Son, such Sum to be paid to or amongst such Child or Children, in such Shares, and at such times, and subject to and under such powers of revocation, conditions, provisoes, limitations, declarations and agreements, as, in the Deed or Deeds by which the power should be exercised, should be inserted and declared. By Indentures of Lease and Release, of the 21st and 22d of September 1778, Estates in *Surrey* were settled to the same uses, and subject to a similar power ; but they were to be auxiliary only to the other Estates in raising the 10,000 *l.*

In 1794, *Thomas Martin* the Elder, having then living two Children only, namely, the Plaintiff, *Judith Farmer*, and the Defendant, *Eleanor Martin*, by an Indenture, dated the 16th of July in that year, after reciting that he was desirous of providing portions for his two Daughters, pursuant to the before-mentioned

powers, in exercise of those powers, demised the Estates, to *George Martin*, for one thousand years, to be computed from the day of his decease, upon trust to raise 10,000*l.*, for the portions of his two Daughters, and to pay the same to them, in equal shares, with interest at 4 per Cent, from his decease: and he declared that the portions should, upon the execution of the Indenture, become vested and transmissible interests in his two Daughters: Provided that it should be lawful for him, by Deed or Will, to revoke or to vary the appointment by appointing more of the 10,000*l.* to one than to the other of his Daughters, or by appointing the same to them or either of them, or to such other Child or Children as he might thereafter have, except an eldest or only Son.

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In 1796, *George Martin*, the Trustee of the Term, died, having appointed the Defendant, the Rev. *Joseph Martin*, his Executor. In 1804, *Thomas Martin* the Elder, being desirous that the interest of his two Daughters in a moiety of the 10,000*l.* should become irrevocable, by an Indenture dated the 27th of March in that year, in pursuance of the power reserved by the Deed of the 16th July 1794, absolutely and irrevocably appointed 5,000*l.*, part of the 10,000*l.*, to his two Daughters, in equal shares, but such last-mentioned appointment was not to prevent his exercising the power, reserved by the Deed of July 1794, as to the remainder of the 10,000*l.*

In 1806, *Thomas Martin* the Elder, being in embarrassed circumstances, and having an illegitimate Son, the Defendant, *Thomas Martin* the Younger, it was arranged, between him and his Daughter *Eleanor*, that

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he should make an irrevocable appointment of the remaining 5,000 *l.* to her, and that she should assign part of that sum for the benefit of his Creditors, and make a provision, for *Thomas Martin* the Younger, out of the remainder. In pursuance of this arrangement, *Thomas Martin* the Elder, by a Deed-Poll of the 26th of November 1806, (after reciting the several Deeds before-mentioned), by force of the powers given to him by those Deeds, and, particularly, by the Deed of the 27th of March 1804, in consideration (as it was expressed) of his natural love and affection for his Daughter *Eleanor*, irrevocably appointed, to her, 5,000 *l.*, the remainder of the 10,000 *l.*: and *Eleanor Martin*, by an Indenture of the 18th of April 1807, assigned, to *Thomas Martin* the Younger, a moiety of the last-mentioned 5,000 *l.*, but she refused to assign any part of that sum for the benefit of her Father's Creditors.

In 1801, *Thomas Martin* the Elder married *Anne Payne*, and had Issue, by her, the Defendants, *James Thomas Martin*, and *Ann Martin*: and, by a Deed-Poll of the 6th of August 1819, executed by *Thomas Martin* the Elder, and his Daughter *Eleanor*, after reciting the Deed-Poll of the 26th of November 1806, and that *Thomas Martin* the Elder, was desirous of revoking the appointment, thereby made in favour of *Eleanor Martin*, so far as related to 2,500 *l.*, part of the 5,000 *l.* thereby appointed, and of absolutely appointing the 2,500 *l.*, the former appointment of which was intended to be thereby revoked, to or in favour of *Ann Martin*, and that, in consideration of *Thomas Martin* the Elder having agreed to secure, to *Eleanor Martin*, an Annuity of 250 *l.*, during her natural life, if he should so long live, *Eleanor Martin* had agreed to join in executing

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the present Deed-Poll, in order to testify her consent to *Thomas Martin* the Elder revoking the Appointment of the 2,500 *l.*, as appointed by the Deed-Poll of 26th of November 1806, and to his appointing the same in favour of *Ann Martin*, in the manner after mentioned, and also to confirm such Appointment, as far as was in her power: It was witnessed that, in pursuance of the Agreement, and of the Annuity of 250 *l.*, intended to be secured, by *Thomas Martin* the Elder, to *Eleanor Martin*, to commence from the date thereof, *Thomas Martin* the Elder, with the privity of *Eleanor Martin*, and in exercise of all Powers enabling him in that behalf, revoked the Appointment, made by the Deed-Poll of the 26th November 1806, of and concerning 2,500 *l.*, part of the 5,000 *l.* thereby appointed in favour of *Eleanor Martin*, and he appointed, and *Eleanor Martin* ratified and confirmed, the said 2,500 *l.*, unto *Ann Martin*, and declared that the same Sum should, immediately upon the Execution thereof, be a vested Interest in her, and as such, transmissible to her Executors, Administrators and Assigns, absolutely and wholly acquitted and discharged from any control, power or claim of *Thomas Martin* the Elder, or of *Eleanor Martin*: and it was thereby provided that nothing therein contained should extend, or be construed to extend to affect or render void the Appointment, made by the Deed-Poll of the 26th of November 1806, of the Sum of 2,500 *l.*, the other part of the 5,000 *l.* thereby appointed in favour of *Eleanor Martin* absolutely, but that she should continue fully and absolutely entitled to the same sum of 2,500 *l.* in the same manner as she would have been entitled thereto if the present Deed-Poll had not been executed.

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In July 1821, *Thomas Martin* the Elder died.

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The Bill was filed, by Mr. and Mrs. *Farmer*, against *James Thomas Martin*, *Thomas Martin* the Younger, *Ann Martin*, the Rev. *Joseph Martin*, and Sir *Anthony Lechmere* and *John Williams Martin*, who were the Trustees of Mr. and Mrs. *Farmer's* Marriage Settlement, and also against *Peter Earnshaw*, who was in possession of the Deed-Poll of the 26th of November 1806. It alleged that Sir *A. Lechmere* and *John Williams Martin* were, as Trustees of the Plaintiffs' Marriage Settlement, entitled to 2,500*l.*, part of the 10,000*l.* under the Indenture of the 27th of March 1804; and that the Deed-Poll of the 26th of November 1806, having been made under the circumstances before stated, was fraudulent and void, as against the Plaintiffs, and that the Plaintiff *Judith Farmer*, or the Plaintiff *Thomas Farmer*, in her right, was, under the Indenture of the 16th of July 1794, entitled to the farther sum 2,500*l.*, other part of the 10,000*l.*

The Bill charged that *Thomas Martin* the Elder had, in August 1819, no right or power to execute the Deed-Poll of the 6th of that Month.

The Bill prayed that the 10,000*l.* might be raised, by Sale or Mortgage of the Estates, and that the Deed-Poll of the 26th of November 1806, might be declared to have been executed, by *Thomas Martin* the Elder, in fraud and violation of, or contrary to the true intent and meaning of the Settlements of the 11th and 12th of February 1771, and 21st and 22nd of September 1778, and that the same was null and void, or voidable, as against the Plaintiffs; and that *Earnshaw* might be

decreed to deliver up that Deed-Poll, to be cancelled ; and that the 10,000 *l.* might be paid, in Moities, to the Plaintiffs *Judith Farmer* and *Eleanor Martin*; and that 2,500 *l.*, being one half of *Judith Farmer's* share, might be paid, to Sir *Anthony Lechmere* and *John Williams Martin*, upon the Trusts of the Plaintiffs' Marriage Settlement, and that the other half of such share might be paid to the Plaintiff *Judith Farmer*, or to the Plaintiff *Thomas Farmer*, in her right, and that it might be declared that *Thomas Martin* the Elder had, in August 1819, no right, power or authority to make or execute the Deed-Poll of the 6th of that Month, and that the same was wholly void, as against the Plaintiffs, and that it might be set aside accordingly. *Eleanor Martin* died, after having put in her Answer. The Defendant *Thomas Martin* the Younger, was her Executor, and the Suit was revived against him.

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There was no Evidence that the Annuity of 250 *l.* had been ever paid, or granted to *Eleanor Martin*.

Mr. *Treslove*, Mr. *Bickersteth*, and Mr. *Muthews*, for the Plaintiffs, said that the Deed-Poll of 1806 contained no power of Revocation, and that, therefore, *Thomas Martin* the Elder could not, by the Deed of 1819, affect the appointment made by the Deed-Poll of 1806: that the Deed of July 1794 remained in force as to the 5,000 *l.* not irrevocably appointed by the Deed of 1804, the Deed of 1806 being void. *Daubeny v. Cockburn* (a).

Mr. *Sugden*, and Mr. *Turner*, for the Defendant *Thomas Martin*:—

This Defendant is entitled to 2,500 *l.* in his own

(a) 1 Mer. 626.

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right, and to 2,500 *l.* as the Representative of *Eleanor Martin*.

The Deed of 1819, so far as respects the 2,500 *l.* not appointed to *Ann*, operates as a confirmation of the Appointment of 1806. To give effect to an Appointment, it is not necessary to use any precise form of words. A mere recital that the Party has made an Appointment, is a sufficient indication of intention to vest the Fund in the Appointee. The Proviso in the Deed of 1819 amounts to an Appointment.

But, if this view of the case cannot be supported, *Thomas Martin* the Younger is entitled to 5,000 *l.* as the Representative of *Eleanor Martin*; for, if the Deed of 1806 cannot be maintained, *Eleanor Martin* took nothing under it, and, therefore, she could make no Assignment to *Ann Martin*. It is impossible to support the Deed of 1819, unless the Deeds of 1806 and 1807 are maintained; for *Eleanor* did not intend to divest herself of any part of the Fund, unless *Thomas Martin* should take what was given to him. The Deed of 1819 is one entire Agreement between the Parties. The Contract between the Parties was entire; and if part of it cannot take effect, it must altogether fall to the ground; and, consequently, the Appointment of July 1794 must prevail.

Mr. *Pepys*, and Mr. *Knight*, for the Defendant *Ann Martin*, contended that, the Deed of 1806 being void, the power of *Thomas Martin* the Elder, under the Deed of 1804, was not affected by it, and remained capable of being exercised; and that he had exercised it by the Deed of 1819: that there was no Evi-

dence to affect the claim of *Ann Martin*; as the Answers of *Eleanor* and *Thomas Martin*, which had been read in support of the Case made by the Plaintiffs, could not be used against *Ann Martin*: that the Title of the Assignee could not be impeached by the Answer of the Assignor; and that, therefore, the Answer of *Eleanor Martin*, or of any Person claiming under her, could not affect the right of *Ann Martin*. *Lord Teynham v. Webb (b)*.

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Mr. Barber, for the Defendant *Earnshaw*, said that, as the Plaintiffs had examined him as a Witness, they must pay him his Costs. *Harvey v. Tebbutt (c)*.

Mr. Treslove, in reply, said that the Plaintiffs were under the necessity of making *Earnshaw* a Party to the Suit, because he had the Deed-Poll of November 1806, in his custody, and refused to deliver it up, although he admitted, in his Answer, that he did not claim to be a Trustee of that Deed-Poll, or to be entitled to any Interest under it, but merely alleged that he had been advised that he should not be justified in delivering it up to be cancelled.

Mr. Girdlestone, and Mr. Joseph Martin, appeared for the other Parties.

The VICE-CHANCELLOR:—

The principal question to be considered in this Case, is what effect is to be given to this Deed-Poll of 1819; because, if that Instrument is capable of operating as the original Execution of the Power, then it would operate so as to give 2,500 *l.* to *Ann Martin*, and the other 2,500 *l.* to *Eleanor*: and the question is whether,

(b) 2 Vez. 198.

(c) 1 Jac. & Walk. 197.

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upon the fair construction of this Deed, it can be taken to have that operation.

Now this Deed-Poll, to which *Thomas Martin* the Elder, and *Eleanor Martin*, are Parties, recites the Deed-Poll of November 1806, at length; and then it proceeds: "Whereas the said *Thomas Martin* is desirous," [His Honor here read the Deed-Poll of 1819;] so that it is clear, upon the face of this Deed, that there was no otherwise an intention to deal with the Property, than by the Execution of a supposed Power of Revocation, and new Appointment, after the Revocation had taken effect, of 2,500 *l.* to *Ann Martin*, and a ratification to *Eleanor*—not an Appointment of 2,500 *l.*, absolutely and independently to her, but only a Declaration that this Instrument should not impeach or affect the Title that she had by the Deed-Poll of November 1806, but that she should remain entitled to the 2,500 *l.*, part of the 5,000 *l.* appointed by that Deed-Poll, in the same manner as she would have been entitled if the Deed of 1819 had not been executed.

Now, in order to see what the Parties intended, one must consider the circumstances under which the Deed of 1819 was executed; because it is plain to me that *Eleanor Martin* and her Father were acting upon the supposition that *Eleanor* had a complete Title by the Deed-Poll of November 1806, and the Father did not mean to give her, by the Deed of 1819, any other Title than such as the Deed of November 1806 had already given her: and, (as I think,) it is impossible to take this Instrument as an Appointment, *de novo*, of the 5,000 *l.*, between the two. It would be a most extraordinary thing to hold that, (because the Father,

in this Instrument, has used a general expression in the Clause of Revocation, namely, he does, "in pursuance of all Powers, &c. revoke," without repeating those words when he comes to make the Appointment,) it is to be taken as an absolute Appointment, to *Ann*, of 2,500*l.*; when it is perfectly clear, upon the face of the Instrument itself, that it was not intended to operate as an Appointment, to *Eleanor*, of the sum of 2,500*l.*, under the Power contained in the Deed of 1804. It does appear to me, therefore, that this Deed cannot be set up, on the part of *Ann Martin*, as an Instrument giving to her 2,500*l.*

Then the question will be, if *Ann*, (whose Title can only be found under the Deed of 1819,) cannot take upon the face of the Instrument, by means of the exercise of the Power of Appointment, which was vested in the Appointor by the Deed of 1794, and confirmed by the Deed of 1804, whether the Deed of 1806 can stand? Now it does appear to me, from what has been read from the Answer of *Eleanor Martin*, and from the Answer of *Thomas Martin*, that there is enough Evidence to show that there was such a course of dealing between *Eleanor* and her Father, for the benefit of the Father and *Thomas Martin*, (who in no way could have taken under the Appointment, whose interest, therefore, is in fact the interest of the Father, because, so far as a Provision could be made, circuitously, for *Thomas*, out of the Residue, the Father did take the benefit,) that the Deed of 1806, did proceed upon a footing, which, in a Court of Equity, is always held to vitiate the Appointment altogether. I think, therefore, that upon the face of the Deed of 1819, *Ann* takes nothing.

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My opinion is that the Instrument of 1819 was intended to be, what it appears to be, that is, an Execution of a Power which the Parties supposed to exist, but which, in point of fact, did not exist, and not as an original Appointment.

It would, I think, be extravagant to suppose that this Instrument could be taken as an Assignment, by *Eleanor*, to *Ann*, of 2,500*l.*; when, in point of fact, the Instrument itself shows quite a different intention between the Parties. It is quite clear that *Eleanor* only supposed she was confirming that which the Father might appoint, and not that she was making an Assignment: and, if it were so, it must be proved, (which has not been done,) that there was a Consideration. The mere circumstance of an Agreement to pay, without proof of Payment, never can be taken as a Consideration.

The result of my opinion will be, that 2,500*l.* of the Sum remaining to be appointed, must be paid to the Trustees of Mrs. *Farmer's* Settlement, and 2,500*l.* will go to herself and her Husband. As to the other 5,000*l.*, it will go to the Personal Representative of *Eleanor Martin*.

Next with respect to the Costs:—As the Suit was rendered necessary by the dealing between *Thomas Martin* the Elder, and *Eleanor Martin*, the Costs of the Plaintiffs must be paid out of that Lady's Share of the 10,000*l.* The Plaintiffs must pay the Costs of *James Thomas Martin*, Mr. *Earnshaw*, and the Trustee of the Term, and must be repaid the amount out of *Eleanor's* Share.

SUTTON v. MASHITER.

1829:
2d March.

Injunction.

THE Testator, in this Cause, had held a Farm and Buildings under a Lease. The Suit was instituted for the administration of his Estate; and the usual Decree had been made. No claim of any Debt or Damages having been brought in, the *Master* reported accordingly. The Cause was then heard for further Directions; and, in pursuance of the Decree, the Executors had paid into Court all their Balances belonging to the Estate. The Lessor afterwards commenced an Action against the Executors, as Executors, for breaches of the Covenant to Repair, contained in the Lease; and was proceeding to Trial at the next Assizes.

If a cause for the Administration of Assets has been heard for further Directions, and the Executors have paid their Balances into Court, an Injunction will be granted to restrain an Action, against the Executors, for breaches of Covenant in a Lease granted to the Testator, and the *Master* will be directed to ascertain the Damages.

Mr. *Bickersteth* and Mr. *Jacob*, for the Executors, now moved for an Injunction to restrain the Action.

Mr. *Barber*, for the Lessor, opposed the Motion, and said that, after a Decree for the Administration of a Testator's Estate, the Court would restrain an Action by a Creditor, for a Debt, because a Debt was an ascertained Sum: but that, in this case, the Damages were not ascertained; and the *Master* had no jurisdiction to decide whether there had been any breach of Covenant, or not: that it was quite another question whether the Court would restrain the Plaintiff in the Action, from taking out Execution, after Verdict.

The VICE-CHANCELLOR:—

It is clear that the Court will not allow this Person who is in the character of a Creditor, to go on with his

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Action. It may be ascertained, by the *Master*, as well as it could be by a Jury, whether any breach of Covenant has been committed, and what is the amount of the Damage: and, therefore, I shall grant the Injunction without Costs, and refer it to the *Master* to ascertain the amount of the Damages in respect of the alleged breaches of Covenant.

DAVENPORT v. MANNERS.

2d March.
Practice.
Dismissal of
Bill.

If, between the giving of a notice of Motion to Dismiss, and the making of the Motion, the Plaintiff obtains an order to Amend, the Plaintiff must pay the Costs of the Motion, but no order will be made upon it.

THE Defendant had given a notice of Motion to dismiss the Bill, for want of prosecution; but, before the Motion could be made, the Plaintiff had obtained, at the Rolls, an order to amend the Bill, as of course.

Mr. *Koe*, for the Defendant, now moved to dismiss the Bill, according to the notice.

Mr. *Norton*, for the Plaintiff, opposed the Motion, on the ground of the Plaintiff having obtained the order to the amend.

The *Vice-Chancellor* said that, as the Plaintiff had obtained an order to amend his Bill, before the Motion to dismiss was made, he could not make any order upon that Motion, but that the Plaintiff must pay the Costs of it to the Defendant.

DAVIS v. DAVIS.

IN this Case the Common Injunction had issued. The Plaintiff, afterwards, obtained an order to amend his Bill, without saving the Injunction: the question was, whether the obtaining of the order to amend, did, of itself, discharge the Injunction.

The *Vice-Chancellor* said that the Injunction was not gone, unless the Record was altered.

Mr. *Knight* for the Plaintiff.

Mr. *Sugden* for the Defendant.

1829:
2d March.

Practice.
Injunction.

The Common Injunction is not dissolved by the Plaintiff obtaining an order to Amend without saving the Injunction, unless the Record is altered.

HODGSON v. MURRAY.

THE Bill prayed that a Promissory Note, for 8,000*l.*, which had been given, by the Plaintiff, to *Rowland Stephenson*, and which the latter, after it became due, had delivered to the Defendant as a Security for a Debt to a greater amount, due from him to the Defendant, might be delivered up to be cancelled, and that the Defendant might be restrained from proceeding in the Action, which he had commenced against the Plaintiff, upon the Note. The Bill alleged that *Stephenson* had agreed to advance the 8,000*l.*, to the Plaintiff, to enable him to pay for an Estate which he had contracted for; that the contract failed, and consequently that nothing was ever advanced upon the Note, and that the Note was, from inadvertence, left in *Stephenson's* hands.

4th March.

Promissory
Note.
Injunction.

Courts of Equity have a concurrent jurisdiction with the Courts of Law in relieving against Promissory Notes, taken when over-due.

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The Defendant, by his Answer, denied any knowledge of the transactions between *Stephenson* and the Plaintiff: he admitted that, when *Stephenson* produced the Note to him, *Stephenson's* Indorsement on it was cancelled: that the reason assigned by *Stephenson* for the cancellation, was to prevent the amount being recovered in case the Note should be lost, and that *Stephenson* afterwards re-endorsed it.

Mr. *Sudgen* and Mr. *Ching*, for the Plaintiff, said that a Person who took a Note when it was over-due, held it subject to all the equities that it was liable to in the hands of the original holder: that, although the Plaintiff might avail himself of that defence in a Court of Law, this Court was not ousted of its Jurisdiction: and they referred to *Byne v. Vivian* (a), *Byne v. Potter* (b), *Bromley v. Holland* (c), and *Watkins v. Maule* (d).

Mr. *Horne*, Mr. *Burge*, and Mr. *Swann*, for the Defendant, said that the Court could not direct that the Bill should be delivered up to be cancelled, as the Defendant might sue *Stephenson*, if he could not sue the Plaintiff, for the amount; that the principle on which the Plaintiff sought relief was originally established in the Courts of Law, and was not adopted by them from this Court: that the Bill sought to oust the Courts of Law of their Jurisdiction in a case where they did complete justice, and that, therefore, the Plaintiff had no right to apply to this Court for its extraordinary interference: that the Answer did not show that there was nothing due on the Note as between the Plaintiff and *Stephenson*, but stated that the

(a) 5 Ves. 604. (b) Ibid. 609. (c) Ibid. 610, & 7 Ves. 3.

(d) 2 Jac. & Walk. 237, see 244.

Defendant knew nothing of the transactions between the Plaintiff and *Stephenson*, and therefore the Plaintiff had not proved, as he ought to have done, that there was nothing due from the one to the other: that the Plaintiff, by suffering the note to remain in *Stephenson's* hands, had enabled the latter to commit a fraud upon the Defendant, and had been guilty of greater negligence than the Defendant had: that the Defendant, if permitted to go to trial, might be able to prove facts from which a Jury would infer that the Plaintiff suffered *Stephenson* to retain the Note for the purpose to which it had been applied, and would thereby get rid of the equity arising from the Defendant's having taken it when it was overdue.

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HODGSON
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The VICE-CHANCELLOR :—

This is a very suspicious case on the part of the Defendant.

Although a Court of Law may not allow the Defendant to recover upon this Note, it is no reason that this Court should be deprived of its Jurisdiction. It appears to me to be a question that ought to be further inquired into in this Court.

Motion granted.

1829:
7th March.

Account.
Trustee.

A Trustee of a Charity Estate, who has used the Balances of the Rents in carrying on his Trade, will be charged with Interest at 5 per Cent, but not with annual Rests.

THE ATTORNEY-GENERAL v. SOLLY.

THE Defendant was a Trustee of a Charity Estate, and had paid the Balances of the rents received by him, into a Mercantile House, in which he was a Partner.

Mr. *Pemberton*, for the *Attorney-General*, contended that yearly Rests ought to be made in taking the Account of the Rents and Profits received by the Defendant, and that he ought to be charged, with Interest at five per Cent, upon the Balances found due from him. *Raphael v. Boehm* (a), *Heathcote v. Hulme* (b), *Stacpoole v. Stacpoole* (c), *Walker v. Woodward* (d), *Griffith v. Heaton* (e).

Mr. *Sugden* and Mr. *Tinney*, for the Defendant, said that *Stacpoole v. Stacpoole* was a Case of Fraud: that, in *Raphael v. Boehm*, there was a Direction for Accumulation; and that, in *Walker v. Woodward*, the Order for making Rests was obtained by surprise. They cited *Crackelt v. Bethune* (f), and *Sutton v. Sharp* (g), and added that Rests were not ordered in those Cases, because they did not come within the very words of *Raphael v. Boehm*.

Mr. *Pemberton*, in reply, said that *Crackelt v. Bethune* was distinguishable from *Raphael v. Boehm*, because, in the latter Case, the Money had been em-

(a) 11 Ves. 92.

(b) 1 Jac. & Walk. 122.

(c) 4 Dow. 209. (d) 1 Russ. 107. (e) 1 Sim. & Stu. 271.

(f) 1 Jac. & Walk. 586.

(g) 1 Russ. 146.

ployed in Trade, which had not been done in the former : that *Crackelt v. Bethune* could not be reconciled with *Stacpoole v. Stacpoole* ; and that the Authority of the House of Lords must prevail over that of the *Master of the Rolls*.

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ATTORNEY-
GENERAL
v.
SOLLY.

The VICE-CHANCELLOR :—

I do not think that there is sufficient Authority to justify me in directing the Account to be taken, in this Case, with Annual Rests. *Raphael v. Boehm* is an excepted Case ; and I never could understand upon what principle Lord *Eldon* confirmed the *Master's* Report in that Case. Here there is no express direction that there shall be an Accumulation, the violation of which was the ground for directing Annual Rests to be made in that Case ; nor is there any Fraud here, as there was in *Stacpoole v. Stacpoole*, where the Trustee gave in false Accounts.

As the Defendant, *Solly*, received the Rents, and used the Money in carrying on his Trade, he ought to be charged with Interest at five per Cent upon his Balances, but yearly Rests ought not to be made.

1829:
10th March.

PORTER AND OTHERS v. CLARKE AND
OTHERS.

*Jurisdiction.
Dissenters.*

The Court will not interfere to prevent the removal of the Minister of a Dissenting Chapel vested in Trustees, when the Deed is silent as to the mode of electing the Minister and his continuance in office, and contains no provision for his support, but he is dependent for it on the voluntary contributions of his flock.

THE Plaintiff, *John Paul Porter*, had been, for thirty-seven years, the Pastor or Minister of a Dissenting Congregation, at Bath, of the Denomination of Particular Baptists, having been, originally, elected to that office, and ordained in the mode usual amongst that class of Dissenters.

The Chapel and Buildings were vested in Trustees upon the following Trusts :—"To permit and suffer the said Messuage, Tenement, Meeting House, Buildings and Premises to be used as and for a place for the Worship of Almighty God, by the Congregation of Protestants dissenting from the Church of England, under the denomination of Particular Baptists, holding the Doctrines of Personal Election, Imputation of Original Sin, Effectual Calling, Free Justification, and Final Perseverance of the Saints, and by the Members and Successors of the same Congregation of Protestants holding the same Doctrines."

Shortly before the filing of the Bill, differences had arisen, in the Congregation, some of the Members being desirous of appointing *Owen Clarke* to be Co-pastor with *Porter*, while others were averse to such appointment. However, on the 13th of March 1828, a Church Meeting was held, at which it was resolved to invite *Clarke* to preach at the Chapel, for three

months, as a Probationer to be Co-pastor with *Porter*. *Clarke* came, accordingly, and, at the end of that period was elected joint Minister with *Porter*. To this election *Porter* refused to consent, alleging that the Congregation had not the Power to appoint a Co-pastor without such Consent. Further disputes and differences were the consequence of this refusal, and, eventually, on the 6th of November 1828, a Church Meeting was held, at which it was resolved that *Porter* should be no longer the Pastor, and that the Defendant *Clarke* should, from that time, be the sole Pastor, and, on the following Sunday, *Porter* was, forcibly, prevented from entering the Pulpit, and *Clarke*, the Defendant, took possession of it.

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There was no endowment for the Minister, nor any Trust Property, except the Chapel and Premises, nor was the Minister paid by the Pew-rents, but, solely, by the voluntary Contributions of Persons attending the Chapel.

The Bill was filed by *Porter*, by the Trustees of the Chapel, and by two of the Members of the Congregation, on behalf of themselves and all other the Members except such as were made Defendants, against *Clarke* and nine of the Members by whose orders *Porter* had been forcibly expelled. It prayed that the Trusts upon which the Premises were held, might be ascertained and declared, and carried into execution by and under the direction and decree of the Court, so far as it might be deemed proper or necessary, and that a sufficient number of proper Persons might be appointed new Trustees, in the room of such as were dead, or desirous of being re-

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CLARKE.

leased from the burthen of their trust, and that it might be declared that *Porter* was the lawful Pastor and Minister of the Chapel and Congregation, and that he might be quieted in the possession of such rights as appertained to him in that capacity: and, also, that the Defendant, *Clarke*, might be restrained, by the Injunction of the Court, from performing the duty of Pastor or Minister of the Chapel and Congregation, or officiating or performing Divine worship in the Chapel, and that he, and the other Defendants, might be restrained, in like manner, from impeding, or, in any manner interfering with *Porter* in the exercise of his duties as Pastor and Minister thereof.

A motion was now made, for an injunction in the terms of the prayer. In support of the motion, numerous affidavits made by Dissenting Ministers of this denomination were read, who all agreed that, when a Minister has been duly elected to be Pastor of a Congregation, and has been ordained according to the form usual amongst them, he holds his office until he thinks fit to decline it; and that no Person, or body of Persons, has power to remove him, or to appoint a Co-pastor with him without his consent.

Mr. *Sugden*, and Mr. *Bellasis*, in support of the motion argued that, where, as in this case, the Trust Deeds were silent as to the mode of electing Ministers, and as to the duration of their office when elected, and where, as in this case also, no custom had yet obtained (the Plaintiff being only the second Minister), the Minister, when elected, was in for life, and that the Congregation had not the power of dismissing him: that, where this Court does not find any contrary custom established,

it always leans to construing the tenure of Dissenting Ministers to be for life: The *Attorney-General v. Pearson* (a): that there could be no doubt that the Court had jurisdiction in this case, although there was no Endowment, because the Chapel itself, and the incidental advantages derivable therefrom, were sufficient to sustain that jurisdiction. *Davis v. Jenkins* (b), *Leslie v. Birnie* (c).

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Mr. *Bickersteth*, Mr. *Knight*, and Mr. *Lynch*, for the Defendants, were stopped by the Court.

The *Vice-Chancellor* said that he had looked into the Deed creating the Trust, and that he could find no direction as to the mode of electing Ministers, or as to the duration of their office when elected; neither could he find that there was any Provision made for the Minister, by the Trust Deed; but that he was dependant, entirely, on the voluntary Contributions of the Members of the Congregation; and he, therefore, could not see that the Plaintiff *Porter* had made any case for the interference of the Court. His Honour added that, independently of the want of jurisdiction, he was of opinion that it was very reasonable that a Minister who depended, entirely, upon voluntary Contributions, should be dismissible, at will, by the Persons so voluntarily contributing.

Motion refused.

(a) 3 Mer. 402. (b) 3 V. & B. 151. (c) 2 Russ. 114.

WAITE v. TEMPLER.

1829:
13th, 15th and
20th March.

Will.
Construction.

A Testator, who had long resided in India, gave a legacy "to T. P. who resided at A. when I left England, or to his Heirs, Executors, Administrators or Assigns." T. P. died in the Testator's lifetime: Held, that the Bequest over was void for uncertainty.

JOHN DUFTY left *England* for *India* in 1784, and never returned. In 1810 he made his Will, which, after giving an Annuity, was as follows: "I give one-fifth part of my remaining Property to *James Templer, Esq.*, who resided in *Bedford Square, Bloomsbury, London*, when I left *England*, or to his Heirs, Executors, Administrators or Assigns, for ever. I give one-fifth of my Residuary Property to the Rev. Mr. *Templer*, who resided at *Lindbridge, near Chudley, in Devonshire*, when I left *England*, or to his Heirs, Executors, Administrators or Assigns, for ever. I give one-fifth of my remaining Property to *Thomas Parlbhy, Esq., Junior*, who resided at *Stonehouse, near Plymouth, Devonshire*, when I left *England*, or to his Heirs, Executors, Administrators or Assigns, for ever. I give one-fifth of said remaining Property to Cousins *Bryan and Benjamin Dufy*, who resided near *Hatherby, Devonshire*, when I left *England*, the said fifth part to be divided equally between them, or to their Heirs, Executors, Administrators or Assigns, for ever. I give one-fifth part of my said remaining Property to my nearest Relations, on my Mother's side, by the name of *Marriott*, which Family resided at *Melton Mowbray, in Leicestershire*, when I left *England*, or to their Heirs, Executors, Administrators or Assigns, for ever."

The Testator died at Sea, on his return to *England*, on the 9th of August 1810, and Letters of Administration of his Personal Estate, with his Will annexed, were granted to *James Templer* and *John Templer*.

In Michaelmas Term, 1813, a Suit was instituted, by *Edward Waite*, and *Ann*, his Wife, against the Administrators and certain other Persons, for the Administration of the Assets of the Testator. *Ann Waite*, was the only Child and Administratrix of *George Marriott*, who was the Brother of the Testator's Mother, and therefore she claimed to be entitled, in right of her Father, to the one-fifth of the Residue of the Testator's Estate, given to his nearest Relations on his Mother's side.

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By the Decree made on the hearing of the Cause, it was referred, to the *Master*, to inquire and state whether *Thomas Parlby*, the Younger, survived the Testator, or, as the Bill alleged, died in his life-time, and when, and who was his Personal Representative. And the *Master* was, also, ordered to inquire and state who were the Testator's nearest Relations, on his Mother's side, by the name of *Marriott*, answering the description in the Will, at the time when the Testator left *England*, and whether any of them survived the Testator, or died in his life-time, and which of them were then living, or had since died, and when, and who were their respective Heirs, Executors, Administrators or Assigns.

In pursuance of this Decree, the *Master* found that *George Marriott*, of *Sysonby*, in the Parish of *Melton Mowbray*, in the County of *Leicester*, was the nearest Relation of the Testator, on his Mother's side, by the name of *Marriott*, answering the description in the Testator's Will, at the time he left *England*: that *George Marriott* died in 1788, and that *Ann Waite*, his Daughter and only next of kin, was his Personal Representative. The *Master* also found that the Defendant

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Judith Parlby, was the Personal Representative of *Thomas Parlby* the Younger. To the *Master's* Report made in pursuance of this Decree, some of the Defendants, who were afterwards found to be some of the Testator's next of kin, took Exceptions; and upon the Cause coming on to be heard as to the Exceptions and for further Directions, it was referred back to the *Master* to inquire and state who were the Testator's next of kin, at his death, and who were the Representatives of such of them as had since died, and, also, who was the nearest Relation of the Testator, on his Mother's side, of the name of *Marriott*, living at the death of the Testator, (which Family resided at *Melton Mowbray*, in *Leicestershire*,) other than a Person or Persons taking that name by Marriage. And the *Master* was to advertise for the next of kin of the Testator, living at his death, and for the Personal Representatives of any of them that had since died.

The *Master* reported that the Defendants, *Bryan Dufty* and *Benjamin Dufty*, the Nephews of the Testator on the part of his Father, and *Ann Waite*, the Wife of the Plaintiff *Edward Waite*, (to whom she was married in February 1787,) and *Sarah Marriott*, and *Mary Baguley*, (whose Maiden names were *Voce*, and who were the Nieces of the Testator on the part of his Mother,) were the next of kin of the Testator, living at his decease, and that all of them were still living, except *Sarah Marriott*, and that *William Marriott*, her Husband, was her Personal Representative: and the *Master* further reported that it did not appear to him that the Testator had any Relation, on his Mother's side, of the name of *Marriott*, living at his death, and then having that name, the said *Sarah Marriott* having acquired that

name by Marriage with *William Marriott*, who was not related to the Testator, and *Ann Waite* having lost the name of *Marriott* by her Marriage with the Plaintiff *Edward Waite*, in the life-time of the Testator.

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TEMPLER.

On the Cause again coming on for further Directions, it was referred back to the *Master* to inquire and state who were the next of kin of *Thomas Parlby* the Younger, living at the respective deaths of *Thomas Parlby*, the Younger, and the Testator, and who were the Personal Representatives of such of them as had since died.

The *Master* found that *Thomas Parlby* the Younger died on the 6th of March 1798; that the Testator died on the 9th of August 1810; that *Thomas Parlby*, the Father of *Thomas Parlby* the Younger, was the only next of kin of his Son living at his Son's decease; that *Thomas Parlby*, the Father, died in 1802; and that *George Templer* and *John Alexander Parlby*, were his Personal Representatives. And the *Master* also found who were the next of kin of *Thomas Parlby*, the Son, living at the death of the Testator.

Ann Waite, having died after the First Decree, the Suit was revived, by the Plaintiff, as her Husband and Personal Representative. He also filed a Bill of Supplement against the Personal Representatives and next of kin, both of the Testator and of *Thomas Parlby*, the Father, and also against the Personal Representative of *Thomas Parlby* the Younger, and his next of kin at the Testator's decease; and, also, against *Wm. Marriott*, and *Wm. Baguley* and *Mary* his Wife, stating that he, the Plaintiff *Edward Waite*, as the Personal

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Representative of *Ann Waite*, his late Wife, was entitled to one fifth-part of the Residue of the Testator's Estate, the said *Ann Waite* having been the nearest Relation of the Testator, on his Mother's side, answering the description in the Will, and praying for the same relief as his late Wife and he, the Plaintiff, in her right, would have been entitled to if she had been living. The next of kin of *Thos. Parlby* the Younger, at the Testator's death, claimed the fifth share of the Estate, which was bequeathed to *Thomas Parlby* the Younger, or to his Heirs, Executors, Administrators or Assigns. The same share was, also, claimed by the Personal Representatives of *Thos. Parlby* the Elder, who was the sole next of kin to *Thos. Parlby* the Younger, at his death.

Mr. *Pepys*, and Mr. *Barber*, for the Plaintiff, argued that *Geo. Marriott*, the Father of the Plaintiff's late Wife, was the Person who answered the description of the Testator's nearest Relation on his Mother's side, by the name of *Marriott*, &c., and that that individual, if he had been living at the Testator's death, would have been entitled to one fifth of the Residue; but, if he were then dead, that the Person who then represented him, by legal succession, was entitled to it, and that that Person was the late Wife of the Plaintiff, she being, both, the Heir and Personal Representative of her late Father, *Geo. Marriott*. *Sibley v. Cook* (a), *Corbyn v. French* (b), *Bridge v. Abbott* (c), *Sanders v. Franks*, (d). But that, if the Court should decide that the share of the Residue, which the Plaintiff claimed, was undisposed of, he, in right of his Wife, who was one

(a) 3 Atk. 572. (b) 4 Vcs. 418. (c) 3 Bro. C. C. 224.
(d) 2 Madd. 147.

of the next of Kin of the Testator, would be entitled to a distributive share of it.

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Mr. *Sugden*, for some of the Testator's next of Kin, contended that the question which had been argued, was concluded by the inquiries which had been directed subsequently to the first Decree.

THE VICE-CHANCELLOR:—

In all the Cases that have been cited in support of the Plaintiff's Claim, there was a person who was, originally, sufficiently described; for no person can take by substitution, under the words "Heirs, Executors, Administrators, or Assigns," unless it is found that there was some one answering the description of the original Legatee at the date of the Will. Now, here, the Testator has given one fifth part of his remaining property to his nearest relations, on his mother's side, by the name of *Marriott*, and proceeds to say, "which family resided at *Melton Mowbray*, in *Leicestershire*, when I left England." It is impossible to read this clause, without perceiving that the Testator meant to annex the time of his leaving England to the residence of the family at *Melton Mowbray*; and if so, there is no *propositus*, and consequently there can be no substitute; and, therefore, this share of the residue belongs to the next of kin.

The other question that was argued in this cause, was who had become entitled under the bequest to *Thos. Parlby*, the younger, or to his Heirs, Executors, Administrators or Assigns.

Mr. *Horne*, and Mr. *Stephenson*, for *Judith Parlby*, the personal representative of *Thomas Parlby*, the younger.

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The Testator, when he made his Will, did not know whether his friends, in *England*, were living or dead. He meant to give a bounty to those friends, if they were living, and, if they were dead, then, to those who were standing in their place. The Court cannot strike out of the Will the words: "Or to his Heirs, Executors, Administrators or Assigns." If *Thos. Parlby*, the younger, were living, at the death of the Testator, those words were unnecessary, as the gift of personalty to any one, is the same as a gift to him and his Heirs, Executors, Administrators and Assigns, and, therefore, those words mean nothing, if they do not mean what we are contending for. The Testator clearly intended to substitute, for *Thos. Parlby*, the younger, if he should be dead, those persons who, by the Law of *England*, might stand in his place. In *Tidwell v. Ariel(e)*, the *Vice-Chancellor* says: "It is said that this direction is inconsistent with a mere personal gift," &c.

The *Vice-Chancellor*:—That case is against you, as I read it.

Mr. *Sugden*, for some of the next of Kin of the Testator, here referred to *Corbyn v. French (f)*, and *Bone v. Cooke(g)*, upon which Mr. *Horne* remarked, that in *Corbyn v. French* the Testator had no doubt as to whether the Individual was alive.

Mr. *Pemberton*, for some of the next of Kin of *Thomas Parlby*, the younger, at the death of the Testator.

(e) 3 Madd. 403, *see* Judgment, 409. (f) 4 Ves. 418.

(g) 13 Price, 332.

Where a Bequest is made to an Individual named, it is a proof that the Testator supposed that he was alive, and intended a personal benefit to him, and, if he dies in the life-time of the Testator, the Legacy lapses. When that is so, the Courts have held that the words "and his Executors and Administrators" are words of limitation and not of substitution. But this principle does not apply, where the Bequest is to *A. or* his Executors, &c. Because it then appears that the Testator contemplated that either the one or the other, and not both, should take. Accordingly, in all the cases, the word "*or*" has been held to be substitutional, unless the effect is controlled by the context. *Stone v. Evans* (h). Two Cases were subsequently decided, which are perfectly consistent with the doctrine that I am supporting, and have established this: That, when there is a Bequest to one for life, and, after the death of the Tenant for life, to *A. or* his Executors, the Executor is substituted only in case *A.* survives the Testator, and dies in the life-time of the Tenant for life. This is the principle of *Corbyn v. French*, and *Bone v. Cooke*. So where there is a Bequest to *A.*, but payment is postponed, and the payment is directed to be made to *A.*, or his Executors, &c. the Executor is substituted only if the Legatee, having survived the Testator, dies before the time of payment. *Tidwell v. Ariel*. All these authorities show that the word "*or*" is a word of substitution, and that the only question is as to the event on which the substitution is to take place. These Cases, and particularly the last, prove that, if the Bequest is to take effect at the death of the Testator, the substitution must have reference to the death of the Legatee in the Testator's life-time. Then, if

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(h) 2 Atk. 86.

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this is the general Rule where a Bequest is made to a Legatee known to be alive, how much stronger is it, if it appears that the Testator, at the time when he made his Will, was ignorant whether the Legatee were living or dead. The reason for using the words of substitution, is then apparent. Upon the face of this Will, the Testator expresses himself as doubtful whether the Legatees were living or dead. It is clear that he had heard nothing of them since he left England; as he describes them as living at particular places when he left England. He had gone to India twenty-four years before the date of his Will. Is it probable that, of five Individuals, all of whom had establishments of their own when he left England, some at least, should not be dead?

Now if "or" be substitutional, as every one of the Cases that I have cited proves, is there any period or event to which it can refer, in this Case, except the Legatee being dead at the death of the Testator? In what event can the Executors be substituted, except in the event of the Legatee being dead at the death of the Testator. The circumstance of substituting the Executors, shows that the contingency is the death of the Legatee. In order to hold that the words "Heirs, Executors," &c. are words of limitation in this Case, the Court must first change "or" into "and," and then expunge all the words of limitation as surplusage. It may be said that the word "or" makes the Bequest uncertain, and, therefore, void. But there is no uncertainty in this Case. The Legacy is to take effect at the death of the Testator. There cannot be two Classes of Persons who will then be entitled to claim it. If the Legatee is alive at the Testator's death, there can be no Heirs, Executors or Administrators. In that case he will take: if, on the

other hand, he be then dead, his Representatives will take. There can be no competition between two claimants, as in the case of a Gift to *A.* or *B.* So a Bequest to *A.* or his Assigns, creates no uncertainty, as there can be no Assigns of the Legatee in the life-time of the Testator. In *Bridges v. Cook* (i), it was decided that the words "legal Representatives" were words of substitution, and that there was no uncertainty in them. The words "Heirs, Executors," &c. here mean next of Kin at the Testator's death.

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Mr. *Bacon*, for another of the next of Kin of *Thomas Parlbby* the younger, living at the Testator's death, also contended that this was a Case of Substitution, and that the Bequest had not failed.

Mr. *Sugden*, and Mr. *Mathews*, for some of the next of Kin of the Testator :

The general Rule is that a Bequest to a person who dies in the life-time of the Testator, whether it is to him simply, or to him and his Executors, is lapsed. There is another rule, which is laid down in *Sibley v. Cook*, that, if a Person gives a Legacy, and means that, if the Legatee dies in his life-time, some one else should take it, he must not only manifest that Intent, but must point out the Person who is to take in that event.

It has been argued that this must be considered as a Case by itself, as the Testator has indicated that he was ignorant whether the object of his bounty were living or dead. I concede that he was ignorant whether the Legatee were living or dead, when he made his

(i) 2 Vern. 378, in Note. See 1 Roper. Leg. 403, *et seq.*

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Will. But does it necessarily follow, therefore, that the Gift over to other Persons, whom he has not described so that the Court can say who they are, is to take effect? It is clear that, in the Gift over, the Testator had no particular objects of bounty in view. It only appears that he intended that the share of the Residue should go to *Parlby's* Estate, and, therefore, to pass a transmissible Interest to his real or personal Representatives. If so, it is nothing more than a Bequest to a man and his Executors; and, therefore, it is a Case in which the Bequest fails.

Next, as to the uncertainty of the Gift over. Suppose that the Testator did not intend that the Bequest should fail, and had other Persons in view to whom it should go, how is the Court to put a construction upon the words used in the Gift over. In *Bridge v. Abbot*, *Evans v. Charles* (*k*), and *Vaux v. Henderson* (*l*), there was only one set of words used, descriptive of one set of Persons, not, as here, where four Classes of Persons are named. In the first of those Cases, the words "legal Representatives" were used, and they were held to mean next of Kin. In the next, the words were, "Personal Representatives," and they were held to mean the Administratrix. In *Vaux v. Henderson*, a Gift over to the Heirs of the original Legatee, was construed as a Gift to his next of Kin. So in *Bridges v. Wood*, and *Price v. Strange* (*m*), the only words were "legal Representatives;" and, on those words, the whole of the difficulty and contest arose. Upon the whole, we submit that the Testator has shown that he

(*k*) 1 Anst. 128.(*l*) 1 Jac. & Walk. 388.(*m*) Madd. & Geld. 159.

intended that this share of the Residue should go as a transmissible Interest, and that the Heirs, &c. of *Parlby* should take in their representative character only; or, at all events, that the Gift over is void for uncertainty, as the words do not describe any particular class of persons.

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Mr. *Teed*, for others of the next of Kin of the Testator :

Either the Bequest to *Thomas Parlby* has failed by his death in the Testator's life-time, or, the Gift over is void for uncertainty. The Description, "who resided," &c. was merely intended to designate who the Legatee was, and not to show that any other persons should take, if he died in the Testator's life-time. In *Toplis v. Baker* (n), the C. B. says : "Now, no Rule is more established than that," &c. On the Authority of *Corbyn v. French*, and *Bone v. Cooke*, the words "Heirs," &c. are surplusage, but if not, the gift over is void for uncertainty.

The VICE-CHANCELLOR :—

As the Testator has used the word "Assigns," the question is, whether he did not contemplate that the Legatee would survive him.

Mr. *Barber* for the Plaintiff :—

It is the Interest of the Plaintiff now to contend that the Bequest to *Parlby* has failed. There are two questions to be decided : whether this is not a Gift to *Parlby* and his Heirs, &c., and, if not, then who is to take under the words of substitution.

(n) 2 Cox, 118; see p. 120, 121.

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The Court has no guide to enable it to discover who the substituted Persons are. The word "Heirs" may mean either Children or Personal Representatives. A Legatee cannot have both Executors and Administrators, and they cannot take as Joint-tenants.

Mr. Pemberton, in Reply :—

It has been said that the words "Heirs, Executors," &c. in this Case, are words of limitation, and not of substitution, but if they are words of substitution, then that they are void for uncertainty. It has been admitted that there is not a single Authority that applies, directly, to this Case; and it has been only said that we are not able to produce an Authority in support of our Claim. But we have *dicta* in our favour. In *Tidwell v. Ariel*, the *Vice-Chancellor* says: "If the direction had been that the respective Legacies should, at his death, be paid to the Legatees or their respective Heirs, the inconsistency contended for would have existed; but a payment to the Representative at the end of a year after the Testator's death, if the Legatee be not then living, is not inconsistent with a personal gift to the Legatee." The Rule upon which the Court acts, in holding a Legacy to be lapsed, cannot be said to apply to a Case where it is apparent, on the face of the Will, that the Testator was ignorant whether the Legatee were living or dead at the date of his Will.

Next, as to the uncertainty of the Bequest over—Every one of the Cases that have been cited is an authority for me: for, in every one of them, the Court has said that it would put some construction upon the words, "Heirs, Executors," &c. and not that they were

so uncertain that it would put no construction at all upon them. In a Bequest to poor Relations, the Court has said that it would cut the knot, and take the Statute of Distributions for its guide, as it cannot decide who are the poor Relations.

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It has been said that, in this Case, there are four classes of Persons, who may claim under the Bequest over. Now, as to Assigns, there can be none unless the Legatee survives the Testator; and, if there is an Executor, there can be no Administrator. Would then a Bequest to the Heirs or Executors of the original Legatee be void? Now it is settled that the word "Heirs," when used as to Personal Estate, always means next of Kin. *Holloway v. Holloway* (o), and *Henderson v. Vaux*. In *Long v. Blackall* (p), the same construction was adopted. In *Lowndes v. Stone* (q), there was a Bequest to the Testator's next of Kin or Heir-at-Law; and the Court held that the next of Kin took. There was as much doubt in that Case, as there is in this. The word "Executors," is, in this Case, synonymous, in effect, with the word "Heirs," for the Executors will be Trustees for the next of Kin. If the Court should think that it is doubtful who the Persons are, who were intended to take under the Bequest over in this Will, it will adopt the safe rule of the Statute of Distributions, and give this share of the Residue to the next of Kin of *Thomas Parlbby* living at the Testator's decease.

Mr. *Ellis*, and Mr. *Wood*, for the Executors of *Thomas Parlbby* the younger, asked for their Costs.

(o) 5 Ves. 399. (p) 3 Ves. 486. (q) 4 Ves. 649.

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The VICE-CHANCELLOR :—

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The question that I have to decide in this Case, arises upon the following Clause in the Will of *John Dufy* : “ I give one fifth of my remaining Property to *Thomas Parlby*, Esq., junior, who resided at *Stonehouse*, near *Plymouth*, *Devonshire*, when I left *England*, or to his Heirs, Executors, Administrators or Assigns, for ever.”

It appears that the Testator left *England*, in 1784. *Thomas Parlby* the younger died in 1798, and left his Father, his only next of Kin at his death. The Testator died in 1810, and this Share of the Testator’s residuary Estate is claimed by the Personal Representatives of *Thomas Parlby* the elder, who was the next of Kin of the Legatee at his death, and also by certain Persons who were the next of Kin of the Legatee, at the death of the Testator : And, in support of the latter of these Claims, it is insisted that the same construction ought to be put upon this Clause, as if the Gift had been to *Thomas Parlby* the younger, or his next of Kin. If that were so, I should have to decide a point which was never before decided in terms.

It is quite clear that a Testator may give a Legacy to a person, and direct that, if the Legatee should die in his life-time, the Legacy should go over. It was so decided in *Darrel v. Molesworth* (r). In that case there was a Gift over in terms completely unambiguous. So, in every case where the Legacy was held to be given over, the Court felt itself bound, by the terms of

the Will, to declare that the intention of the Testator was that the Legacy should go over. The cases to which I allude are, *Sibley v. Cook*, *Sibthorp v. Moxom*, (s), *Bridge v. Abbott*, and *Sanders v. Franks*. Now, in *Corbyn v. French*, where a fund was given to the Testator's Wife for life, and, after her decease, a certain portion of that fund was given to four persons, or their representatives or representative, Lord *Alvanley*, M. R. said: "I will not determine now, because it is not necessary, that, where a Legacy is given to a person, or to his representatives, it can mean any thing but in case of his death in the life of the Testator: but it is perfectly clear that, where the fund is given to one for life, and, after the death of that person, to several others, and, in case of their deaths, to their representatives, there is no reason to presume an intention that it shall not lapse by the death of the Legatee, in the life of the Testator" (t). And it is observable that, in the case of *Tidwell v. Ariel*, Sir *Thos. Plumer*, M. R. thought himself at liberty to hold that the Testatrix did not mean the Legacy to go over. It does not appear to me that I am under the necessity of deciding the hypothetical case, put by Lord *Alvanley*, any more than Lord *Alvanley* was. For, in this Case, the Testator does not give the share of his residue to *Thos. Parlby*, or his next of Kin. The words used are very different. If the Testator had meant to give the share of his residue over to a person who might claim by reason of the anterior death of *Thos. Parlby*, he would have said: "If *Thos. Parlby* be now dead, or shall die in my life-time, then I give the share of my Residue before bequeathed to him, to A. B." There is, however,

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(s) 3 Atk. 580.

(t) See 4 Ves. 435.

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nothing on the face of this Will to show that the Testator contemplated either of those contingencies. And, in this case, I am called upon to put a construction upon this Will, as if the said Testator had said: "I give one fifth of my remaining property to *Thomas Parlbby*, or his next of Kin." I am, therefore, called upon to strike out of the Will the words that I find in it, and to substitute words that are totally different. I am called upon to say that the Testator meant next of Kin, when every word that he has used shows that he meant something else: for next of Kin are not Heirs, Executors, Administrators, or Assigns. My opinion is that I am not authorized, by any decided Case, to put any such construction upon this bequest.

It has been said that the Court has construed the word "heirs" to mean "next of kin," but it has never construed the words, "heirs, executors, administrators, or assigns," to mean "next of Kin." In *Stone v. Evans*, the words of the gift over were the same as they are in this case, but Mr. *Justice Wright* gave no opinion upon the meaning of those words, and their meaning was not argued, and it was merely decided that as the residue was given to the Testator's Sister, as Executrix, and she died in the Testator's life-time, her Administrator could not take. In *Lowndes v. Stone*, the Testator used these words: "the remainder and residue of my Estate (if any) and Effects of what nature soever and wheresoever, which I shall, at my decease, be seised or possessed of or entitled unto or interested in, I give next of kin or heir at law; and the Court ordered distribution to be made according to the Statute. The Bequest, therefore, was held to be void; for, if it had been held to be a good bequest to the next of Kin, they

would have taken as Joint-tenants; and therefore, the Court, in effect, declared that the Bequest was void. In *Holloway v. Holloway*, the Testator gave 4,000 *l.*, in trust for such person or persons as should be his Heir or Heirs-at-law. There only one description of persons was spoken of: and Lord *Alvanley*, M.R. said: "If I was under the necessity of deciding this point, I must hold it Heirs *quond* the property; that is, next of Kin. But I am relieved from that; as, if heirs at his death are meant, they are the same persons; the three daughters being both heirs and next of kin; and, if they did not take as heirs-at-law, they took an absolute interest in themselves, in the personal Estate. Great difficulties would arise from the construction that heirs-at-law are intended, and applying it to personal property. He might have different heirs at law; heirs descending from himself as first Purchaser; heirs *ex parte paterna*, and *ex parte materna*" (*u*). It is observable, therefore, that the Court did not decide that "Heirs" meant next of Kin. In *Vaux v. Henderson*, before Sir *W. Grant*, the words were: "I give and bequeath, to Mr. *Edward Vaux*, senior, of *Austin Friars, London*, Merchant, 200 *l.*, and failing him by decease before me, to his heirs." The M. R. held that the 200 *l.* belonged to the next of Kin of *Vaux* at the death of the Testator. But, in that case, there was only one single description of persons mentioned in the Bequest over. In *Gwynne v. Mud-dock* (*x*) there was a gift of both real and personal Estate, to *Ann Williams*, during her life, and the Testator's next heir was to enjoy the same after her death; and Sir *W. Grant* said that there was no doubt that the Heir-at-Law, properly and technically speaking, might

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(*u*) See 5 Ves. 403.

(*x*) 14 Ves. 488.

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take personal Property bequeathed to him by that description. These Cases show that the word "Heir" when used in bequeathing personal Estate, may mean *persona designata* as Heir, or that it may not mean so. But here there are four descriptions of persons mentioned. When the Testator used the word "Assigns" he contemplated some person who might derive title by an act of the Legatee; and when he used the word "Heir" he described a person who could not take by the act of the Legatee. And to these two words the Testator has added "Executors and Administrators." My opinion therefore is that the Bequest over is totally void for uncertainty.

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16th March.

WONTNER v. WRIGHT.

Costs.
Incumbrances.

THE Plaintiff was a Mortgagee of a real Estate, with a power of Sale. There were other Incumbrances upon the Property, all of which were subsequent to the Plaintiff's Mortgage. The Plaintiff had lost the Title Deeds of the Estate, and on that account was under the necessity of instituting the Suit, for the purpose of having the Estate sold under the Decree of the Court. The Estate was sold accordingly, but the proceeds were not sufficient to pay the Principal and Interest due to the Plaintiff. Upon the Cause coming on for further directions, the question was, whether the subsequent Incumbrancers were entitled to be paid their Costs out of the Purchase-money.

A first Incumbrancer having a Power of Sale, but having lost the Title Deeds, institutes a Suit to have the Estate sold, the subsequent Incumbrancers are entitled to be paid their Costs, although the proceeds of the Sale are not sufficient to pay what is due to the Plaintiff.

Mr. *Roupell*, for the Plaintiff.

Mr. *Knight*, for one of the subsequent Incumbrancers, cited *Kenebel v. Scrafton* (a), and *White v. the Bishop of Peterborough* (b).

Mr. *Martin*, and Mr. *Spence*, appeared for the other subsequent Incumbrancers.

The *Vice-Chancellor* directed that the subsequent Incumbrancers should be paid their Costs out of the proceeds of the Sale of the Estate.

(a) 13 Ves. 370.

(b) Jac. Rep. 402.

1829 :
19th March.

Subpœna.
Attachment.

An Attachment for non-appearance to a Subpœna served in Guernsey, is irregular.

FERNANDEZ v. CORBIN.

THE Defendant had been served with a Subpœna, in the Island of *Guernsey*, but did not pay obedience to the Writ. The Plaintiff's Clerk in Court having declined to issue an Attachment against the Defendant, for want of appearance, on the ground that the Subpœna had been served in *Guernsey*, the *Vice-Chancellor*, on the 9th of *December* 1828, ordered, upon an affidavit of the service of the Subpœna, that the Clerk in Court should be at liberty to issue the Attachment. It did not appear that the Defendant had been within the jurisdiction of the Court since the Subpœna was served.

Mr. *Campbell*, for the Defendant, now moved that the Order for the Attachment might be discharged, for irregularity. He referred to *Bourke v. Lord Macdonald* (a), *Scott v. Hough* (b), *Shaw v. Lindsay* (c), and said that those cases were no authority for making the Order now sought to be discharged, as it appeared, from the Registrar's book, that no Orders were made in them (d): That the last Case was *Nichol v. Gwyn*, (e): But that there was this specialty in that Case;

(a) 2 Dick. 587.

(b) 4 Bro. C. C. 213, *see* Mr. Belt's Note. (c) 18 Ves. 496.

(d) In the Note to *Shaw v. Lindsay*, in the second edition of Mr. Vesey's Reports, it is stated that the Order applied for in that case was finally refused, the cases cited proving to be misreported.

(e) *Ante*, 1st vol. 389.

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the Defendant's solicitor had acknowledged the service of the Subpœna, and had undertaken to appear.

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Mr. *Whitmarsh*, for the Plaintiff.

The *Vice-Chancellor* said that he had expressed a doubt as to the propriety of making the Order for the Attachment, when it was applied for, and that that doubt was now confirmed.

Order discharged, without Costs.

KING v. TURNER.

1829:
18th March.

Copyhold.

BY an Indenture, dated the 20th of June 1814, made between *George Green*, of the first part, *Mary Green*, the Mother of *George Green*, of the second part; *Richard Challen*, and the several other persons whose Names were thereunto subscribed, and Seals affixed, (Creditors of *George Green*,) of the third part; and the Plaintiffs, of the fourth part; after reciting that *George Green* was indebted, unto the said Creditors, in the several Sums of Money set opposite to their respective Names, at the foot of the Indenture, which he was then unable fully to pay; and that he was seised in fee of one undivided moiety of a copyhold Farm, holden of the Manor of *Bury*, subject to the Bench or other Estate or Interest of *Mary Green* therein, which he had agreed to surrender, to the Plaintiffs, being Trustees appointed on behalf of themselves and all other his

A Copyhold Estate will not pass by the Will of a Devisor who dies before admittance.

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Creditors, parties thereto, upon the trusts thereafter expressed: It was witnessed that, in pursuance of the Agreement, *George Green*, for himself, his Heirs, Executors, and Administrators, and *Mary Green*, for herself, her Heirs, Executors and Administrators, did thereby severally covenant with the Plaintiffs, their Heirs, Executors and Administrators, that he, *George Green*, would immediately, or as soon as conveniently might be after the execution of the Indenture, procure himself to be admitted Tenant, according to the custom of the Manor, of the undivided Moiety of the Farm; and that, immediately after such admission, *George Green* and *Mary Green*, would surrender the same undivided Moiety to the use of the Plaintiffs, their Heirs and Assigns, or to the use of such other person or persons as he or they should direct or appoint, upon trust, as soon as conveniently might be after the execution of the Indenture, to sell and dispose thereof, and to apply the Money produced by the sale, in the manner therein mentioned.

George Green made his Will, which was, in part, in the following words: "Whereas being entitled to the copyhold Messuages, Farms and Lands, called the *Hoe Land* and *Hoe Green*, upon which I now reside, subject to the Life Interest of my Mother, I some time ago covenanted to surrender the same, to Trustees, for the benefit of my Creditors, on condition that the Sum of 700*l.* was secured to me by the Bond of the said Trustees, the Interest whereof, during my Mother's Life, was to be paid to her: I give and devise all the said Copyhold Messuages, Farms and Lands, with their Appurtenances, called the *Hoe Land* and *Hoe Green*, unto my Friend *John Salter*, his Heirs and Assigns,

upon Trust, and I declare and direct that it shall and may be lawful, to and for the said *John Salter*, his Heirs and Assigns, for the purpose of carrying my said covenant into effect, at the request, costs and charges of the said Trustees, to enter into and execute all necessary Contracts, Agreements, Assignments, Surrenders and Assurances, of the same Premises, to them the said Trustees, or as they shall direct."

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George Green died in 1819, never having been admitted to the Copyhold Estate, leaving the Defendant, *Jane Watts Green*, an Infant, his only Child and Customary Heir, and leaving *John Salter* him surviving. *John Salter* afterwards made his Will, but did not accept the Trust Estate. He died in 1820, and left the Defendant, *Henry Salter*, an Infant, his youngest Son and Heir according to the custom of the Manor.

The Plaintiffs having agreed to sell the Estate to the Defendant, *John Turner*, this Suit was instituted to compel a specific performance of the Agreement. The question was, whether the Plaintiffs could make or procure to be made a good Surrender of the Estate to the Purchaser.

The Cause came on to be heard on the 20th of November 1824 ; and, by the Decree then made, it was declared that the Agreement ought to be specifically performed, provided a good Title could be made to the Estate ; and it was referred to the *Master* to inquire as to the Title. The *Master* reported in favour of the Title.

On the Cause coming on for further Directions, it was ordered that the *Master's* Report should be con-

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firmed, and that the Plaintiffs, and the Defendant, *Mary Green*, and all necessary Parties, should join, as the *Master* should direct, in conveying and surrendering the Premises to the Defendant *Turner*. And it was ordered that the Defendant, *Jane Watts Green*, should join in such Surrender.

Previously to the hearing it had been agreed, between the Parties, in order to avoid expense, that the question whether the Plaintiffs could procure a Conveyance or Surrender of the Estate, should be submitted to the Court, in the same way as if exceptions had been taken to the *Master's* Certificate approving of a Conveyance, and the Cause had been set down on the Exceptions and further Directions; but that point was omitted to be then stated; and the Cause was thereupon again mentioned to the Court, on this point alone, on the discussion of the Minutes of the last-mentioned order.

Mr. *Horne*, and Mr. *Pemberton*, for the Plaintiffs.
Mr. *Sugden*, and Mr. *Jacob*, for the Defendant. *

The VICE-CHANCELLOR:—

In *Smith v. Triggs* (a), *Jane Day* was the customary Heir of *Jane Triggs*, *Jane Triggs* had surrendered to the use of her Will, and devised to *Jane Day*, in Fee; and the Court held, that *Jane Day* took by descent: and *Jane Day*, before admittance and without surrender to the use of her Will, devised to the Defendant. The Court said: "There is no Title in him, for want of an admittance of *Jane Day*, and, also, for want of a surrender to the use of her Will" (b). And Sir *Thomas*

* The Reporter had no note of the Arguments.

(a) 1 Str. 487.

(b) See p. 489.

Plumer, in *Wainewright v. Elwell* (c), referring to *Smith v. Triggs*, says : " An Heir-at-Law cannot, before admittance, devise a Copyhold descended to him." In p. 636, Sir T. *Plumer* takes notice of both points. *Doe v. Vernon* (d), has no reference to the case of an Heir. See *Brown's Case* (e), which supposes that, if the Heir surrendered before admittance, the Lord is satisfied of his fine.

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The Statute 55 Geo. 3, c. 192, seems to apply to those Cases only where a Surrender alone would have made good the Will, *Doe v. Bartle* (f), and not to cases where a Surrender and something else are necessary; and the 2d Section of the Act supposes the Fee on the admission of the Surrenderee only to be payable; and not the Fee on the admission of the Surrenderor, to be also payable. The conclusion that I come to, is that this Title is bad.

IT having been held that the legal Estate in the Copyhold did not pass by *G. Green's Will*, but descended to his Heiress-at-Law, who was an Infant, it was argued, for the Defendant, that, as the Property was vested in *George Green*, subject only to a Covenant by him to surrender to the Plaintiffs, this Covenant did not render either him or his Heiress a Trustee, in the same way as if there had been an

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*Vendor and
Purchaser.
Infant Trustee.*

A Copyholder
Covenants to
surrender to
Trustees in
Trust to sell,
and dies before
surrender,

leaving an Infant Heir, the Covenantees agree to sell the Estate, and afterwards file a Bill for a specific performance : Held, that the Heir is not an Infant Trustee within 6 Geo. 4, c. 74, and therefore cannot be ordered to surrender immediately; and the Bill was dismissed, with Costs.

(c) 1 Madd. 632.

(d) 7 East, 8.

(e) 4 Rep. 226.

(f) 5 B. & A. 492.

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express Declaration; that the Infant Heiress was only a constructive Trustee, and, therefore, could not be ordered to convey under the Statute 6 Geo. 4, c. 74; that, consequently, the Plaintiffs could not procure a Conveyance at present, and the Bill must be dismissed.

Mr. *Horne*, and Mr. *Pemberton*, for the Plaintiffs, submitted that a constructive Trustee was within the new Statute 6 Geo. 4, c. 74, the language of which varied from the 7 Anne, c. 19, (leaving out the word “only”); that here the Infant Heiress was a Party Defendant to the Suit, and the Decree had declared that the Contract ought to be performed, which Decree bound the Infant; and that, even if the Statute did not apply to a constructive Trustee, still it would apply to an Infant declared to be a Trustee by a Decree in a Cause: That, if a Conveyance could not be obtained at present, the Bill ought not to be dismissed; but the Conveyance only respited till the Infant came of age: that the delay had arisen from the Defendant’s conduct; as the Contract was made in 1814, and *George Green* did not die till 1819; that in the interval, there would have been no difficulty in making a Conveyance, and that the Defendant ought not to escape from the Contract by an accident occurring from his own laches and default.

Mr. *Sugden*, and Mr. *Jacob*, for the Defendant, said that the delay was on the part of the Plaintiffs, who did not file the Bill till 1821, and that the *Lord Chancellor* had decided in *Dew v. Clarke* (a), that a constructive Trustee was not within the late Statute: And that, in *Bentham v.*

(a) 4 Russ. 511.

Wiltshire (b), the Plaintiffs were not able to procure a Conveyance to be executed, and the Bill was dismissed with Costs. *Bullock v. Bullock* (c), and *Holland v. Hill* (d), were also cited.

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The *Vice-Chancellor* said that he always considered that the Statute of Anne did not apply to constructive Trustees : that the late Act 6 Geo. 4, c. 74, did not, as he conceived, apply : that the only distinction was that the late Statute extended to Infant Trustees having an interest, and to cases where there were executory Trusts to be performed ; that the circumstance of there being a Decree did not make any difference ; because a Decree declaring an Infant to be a Trustee, must give him a day to show cause, when he came of age, and could only direct him to convey when he should come of age, unless he should show cause against it : a Decree, therefore, could not enable the Court to direct him to convey before he came of age, and, therefore, could not make him a Trustee within the Statute. The consequence was, that the Plaintiffs could not now procure a Conveyance, and, therefore, the Bill must be dismissed with Costs (e).

(b) 4 Madd. 44.

(c) 1 Jac. & Walk. 603.

(d) Sugd. Vend. 323.

(e) See 1 Will. 4. Chap. 60.

1829:
21st March.

*Landlord and
Tenant.
Outstanding
Term.*

Testator devised, an estate to several persons for their lives, successively, with power to grant Leases, under certain restrictions. The first Tenant for Life grants a Lease to a person who had no notice of the power, or that the Lessor was Tenant for life only. A subsequent Tenant for life brings an Ejectment against the Lessee, on the ground that the Lease was not made according to the Power. The Court will not prevent the Lessee from setting up an old outstanding term created by the Testator.

GOLEBORN v. ALCOCK.

WILLIAM CHILWELL, Esq., deceased, devised all his Freehold Estates, unto *Joseph Waring* and *Maurice Swabey*, and their Heirs, to the use of his Niece Dame *Elizabeth Mawbey*, the Wife of Sir *Joseph Mawbey*, for life, with Remainder to the use of Sir *Joseph Mawbey*, for life, with Remainder to the use of *Waring* and *Swabey*, for the term of 500 years, with Remainder to the use of *Joseph Mawbey*, Esq., with Remainder to the use of his first and other Sons, successively, in tail general, with Remainder to the use of Trustees, for the term of 1,000 years, with Remainder to the use of the Plaintiff *Catherine Goleborn*, then *Catherine Mawbey*, for her life, with Remainder to the use of the first and other Sons of *Catherine Goleborn*, successively, in tail general, with Remainder to the use of the Testator's right Heirs; and by the Will, power was given to Sir *Joseph Mawbey*, and Dame *Elizabeth* his Wife, and the Survivor of them, and, after both their deaths, to *Joseph Mawbey* and *Catherine Mawbey*, when they should respectively be in the actual possession of the Estates, to lease such part of the Estates as should be fit for the purpose of having Houses and Buildings erected thereon, for 61 years, in possession, at the most improved yearly rent, and so as in such Leases there were contained all proper Covenants, on the part of the Tenants thereof, for laying out reasonable Sums of Money in erecting, finishing, and completing good and substantial Houses thereon, and for keeping the same in good Repair.

Dame *Elizabeth Mawbey* died in the Testator's lifetime.

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ALCOCK.

The Testator died in the year 1795; and, upon his death, Sir *Joseph Mawbey* entered into Possession of the Estates. He died in June, 1798; and, thereupon, *Joseph Mawbey*, Esq., who, upon the death of his father, became Sir *Joseph Mawbey*, Bart. entered into Possession of the Estates. He died in August 1817, without Issue Male; and, thereupon, the Plaintiff, *Catherine Goleborn*, the next Devisee in the Will, became entitled to the Estates.

The Plaintiffs, *Thomas Lynch Goleborn* and *Catherine* his Wife, discovered that Sir *Joseph Mawbey* the elder had granted a Lease, dated the 1st of *May*, 1798, to *Richard Hernishaw*, of part of the Estate, for a Term of Sixty-one Years, which Sir *Joseph Mawbey* had not any power to do, inasmuch as such Lease was not of any part of the Premises for the purpose of having Houses and Buildings erected thereon, and did not contain any Covenant to erect any Houses or Buildings upon any part of the demised Premises. Accordingly they, in 1825, caused an Ejectment to be commenced against the Tenant in Possession of the Premises, which was defended by the Defendant, *Thomas Alcock*, as the Landlord. The Action was tried at the Summer Assizes for 1825. After the Plaintiffs had made out their Title to the Possession of the Premises, a Witness for *Thomas Alcock*, the Defendant, produced and proved two Leases; one of them bearing date the 1st of *September*, 1790, and made between the Testator, *William Chilwell*, of the one part, and *John Clark*, of

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 v.
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the other part, whereby *Chilwell* demised to *Clark* part of the Premises included in the Lease to *Hernishaw*, for the Term of Sixty-one Years, reckoning from the year 1790, at the Rent of 55 *l.* per annum; and the other of which Leases bore date the 7th of June, 1792, and was made between *Chilwell*, of the one part, and *John Clark* and *James Clark*, of the other part, and, thereby, *Chilwell* demised to *John* and *James Clark* other Hereditaments being the Residue of the Premises comprised in *Hernishaw's* Lease, for the Term of Fifty-nine Years and a half, reckoning from the year 1792, at the Rent of 10 *l.* per annum. As those Leases bore date prior to the Lease to *Hernishaw*, the Plaintiffs were non-suited in the Action. When the Action was tried, these two Leases were in the possession of the Executor of a person named *Woods*, to whom they had been assigned by way of Mortgage. The Principal and Interest secured by this Mortgage were paid off in the year 1797. The Leases, however, were never re-assigned to the Mortgagor, but were left in the possession of the Mortgagee; and they were produced, on behalf of the Defendant, at the trial of the Ejectment, by the Solicitor to the Mortgagee's Executor.

After the Bill was filed, the Defendant, *Thomas Alcock*, procured the Leases to be assigned to him, by the Mortgagee's Executor, but did not pay any valuable consideration for the Assignment.

The Bill, after stating the before-mentioned facts, alleged, and the answer admitted, that the Leases to the *Clarks* had been abandoned: That, ever since the Lease was granted to *Hernishaw*, a Title to the Premises

had been claimed and enjoyed under that Lease : That *Hernishaw*, when the Lease was granted to him, entered into the Possession of the Premises, and neither *John Clark*, nor *James Clark*, nor any person claiming under them, at any time afterwards, claimed any Title to the Premises, or paid any Rent for the same, nor was any Rent ever demanded from them, or from any person claiming under them. The Bill then deduced the Title, to the Premises, from *Hernishaw* to the Defendant *Thomas Alcock*, and alleged that *John Alcock*, the uncle of *T. Alcock*, who, in 1803, purchased the Lease from *Hernishaw*, and from whom *T. Alcock's* Title to the Lease was derived, had acted as Sir *J. Mawbey's* Solicitor in preparing that Lease, and at that time had, in his possession, the Counterparts of the Leases granted to the *Clarks*.

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The Bill further alleged that, the Plaintiffs intended to bring another Ejectment for the recovery of the Premises, and prayed that the Defendant *Thomas Alcock* might be decreed to deliver up, to the Plaintiffs, the two Leases granted to the *Clarks*, and might be restrained from setting up or making use of those Leases, as a defence to the Action of Ejectment intended to be commenced by them.

Mr. *Horne*, and Mr. *Koe*, for the Plaintiffs :

The Defendant, *Thomas Alcock*, stands in the same situation, with respect to the Lease, as *Hernishaw* did ; and must be understood to have adopted the Title of the Lessor. If that be so, the relation between these parties is that of Landlord and Tenant ; and therefore it necessarily follows that the Defendant can not get

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out of his Lease, and set up the outstanding terms granted to the *Clarks*. No person can set up an outstanding term, to defeat an equitable Title, except a Purchaser for valuable consideration without notice. If the Defendant is once fixed with the relation of Tenant, to the Plaintiffs, it is impossible for him to set up, against the Contract between him and his Landlord, an outstanding legal Estate in another person, who has no beneficial interest. That Estate is outstanding, not for the purpose of being used by one of the parties against the other; but it is part of, and accompanies their common Title. At the time of the Trial, these terms were vested, not in the Defendant, *Alcock*, but in the representative of the Mortgagee. He would not have been permitted to set up the terms against the Plaintiffs; for, as soon as a Mortgage is satisfied, the Mortgagee becomes a Trustee for the Mortgagor. Neither the *Clarks*, nor the representative of the Mortgagee, have set up any claim to these terms; then surely this Defendant ought not to be permitted to avail himself of them. This Defendant, and those under whom he claims, have, ever since the granting of the Lease in 1798, been in possession under it, and have paid the rent thereby reserved. The taking of the Lease by *Hernshaw*, was an admission that the Lessor was entitled to grant the Lease, and that there was no Title in any other person; and the subsequent payment of rent is a recognition of the Title of the Lessor, and of those who, since his death, have become successively entitled to the Testator's Estates. The Defendant can not say that he had no notice of the Lessor's Title; for the course in which the rent has been paid, is the course pointed out by the Will. Therefore this is the case of a Lessee continuing to acknowledge

himself tenant under a lease made by a person who had no power to grant it, except under certain terms which have not been complied with. The obligations which this Defendant is under to the present Tenant for life, are the same as those that he would have owed to the Tenant for life who granted the Lease. If a Tenant has any thing to contest with his Landlord, he may contest it fairly, but can not set up an outstanding term created prior to his Lease. These satisfied terms are as much part of the Title of the Landlord, as they are part of the Title of the Tenant: and, as a Court of Equity would not allow the Landlord to avail himself of them against his tenant, so neither will it permit the Tenant to set them up against the Landlord. The question to be decided is, whether the Lease of 1798 be a good one: and this Court will not permit either of the parties to defeat the justice of the Case by setting up an outstanding Estate. The Defendant, by abandoning the protection of his Lease, and defending himself under the prior terms, admits that his Lease is an invalid one. The Lease of 1798 was inconsistent with the prior Leases, and the possession that has followed it, has been inconsistent with the Title under those Leases: they must, therefore, be presumed to be surrendered. The Defendant admits that he paid no valuable consideration for the assignments of those Leases; from which it follows that he is not a purchaser for valuable consideration, and that the representative of the Mortgagee had a mere legal Estate, and who has acted fraudulently by assigning that Estate to the Defendant, in order to give him an unfair advantage over the Plaintiffs.

The Defendant claims under the solicitor who pre-

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pared *Hernishaw's Lease*; and he admits that that person had, in his possession, the Counterparts of the Leases to the *Clarks*, at the time when he prepared *Hernishaw's Lease*: and, therefore, he claims under a person who had notice of the existence of the Leases to the *Clarks* before he became possessed of *Hernishaw's Lease*. The Defendant admits that he obtained the Leases to the *Clarks* to be assigned to him pending the Suit; and, therefore, that assignment does not place him in a better situation than he was in before it was made.

Mr. Sugden, Mr. Bickersteth, and Mr. Knight, appeared for the Defendant.

But the *Vice-Chancellor*, without hearing them, delivered Judgment as follows:

In this Case *William Chilwell*, being seised in fee, devised his Estates to dame *Eliz. Mawbey*, for life, with Remainder to her husband, Sir *Joseph Mawbey*, for life, with Remainder to his Son *Joseph Mawbey*, esq., (who, upon the death of his Father, became Sir *Joseph Mawbey*) for life, with Remainder to the first and other Sons of Sir *Joseph Mawbey*, the Son, in tail, with Remainder to the Plaintiff *Catherine Goleborn*, for life, with Remainder to her first and other Sons in tail, with Remainder to the Testator's own right Heirs. And the Will contained a Power enabling the Tenants for life to grant Building Leases, for 61 years. The Testator died in the year 1795, having made two Leases, one in the year 1790, to *John Clark*, and the other, in 1792, to *John Clark* and *James Clark*. Those Leases were, afterwards, assigned to *Woods* by way of Mortgage.

This Mortgage was paid off in 1797. In *May* 1798, Sir *Joseph Mawbey*, the elder, granted the Lease to *Hernishaw*, which the Plaintiffs are now seeking to set aside. The first half year's rent under that Lease, became due at Michaelmas 1798. Sir *Joseph Mawbey*, the elder, died in June of that year. Now there was nothing in this Lease which could lead any person to suspect that the Lessor was any thing but Tenant in fee of the premises. *Hernishaw* was a purchaser for a valuable consideration; and his Lease was afterwards sold to *John Alcock*, who, at the time when the Lease was granted, was the Solicitor of the Lessor.

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Now it is a settled rule of this Court that, if there be a Purchaser for a valuable consideration without notice, and his Title is impugned, he may get in any outstanding legal Estate, and set it up in defence to any Ejectment that may be brought against him; and, if the first Purchaser had no notice of the ground upon which the title is sought to be impugned, a subsequent purchaser may protect himself, though he had notice of it. Now it does not appear that *Hernishaw* had any notice of the ground upon which it is now contended that his Lease is void; and, if not, it is competent to *Alcock* to avail himself of *Hernishaw's* want of notice.

It has been said that it is not competent, to a Lessee, to disaffirm his Lessor's Title. That is true: but the converse, also, is true; namely, that a Lessor ought not to impugn the Title of his Lessee. The circumstance that, since the Lease was granted to *Hernishaw*, no rent has been paid under the Leases granted to the *Clarks*, is of no weight. And I am of opinion that, though the Lease to *Hernishaw* may be inconsistent

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with the Leases to the *Clarks*, I have now before me merely the Case in which a person who has purchased the Interest of a Purchaser for a valuable consideration without notice, has got in the legal Estate, and means to avail himself of it to protect his Possession. And I am of opinion, that he is entitled so to do ; and, therefore, I dismiss the Bill with Costs.

1829 :

21st March.

*Salary.**Public Policy.*
Receiver.

The Salary of the assistant Parliamentary Counsel to the Treasury is not assignable, and the Court will not appoint a Receiver of it.

COOPER v. REILLY.

BY an Indenture dated the 25th of May 1822, and made between Sir *T. E. Tomlins*, of the first part, *Thomas Tomlins* and *Richard Cuerton*, of the second part, and *John Reilly* and *James Tomlins*, of the third part ; after reciting that Sir *T. E. Tomlins* was indebted to *Thomas Tomlins*, *Richard Cuerton*, and *John Reilly*, in the three Sums of Money therein mentioned, and that *Reilly*, for better securing the payment of those sums, had, with the consent of Sir *T. E. Tomlins*, and with the privity and approbation of *T. Tomlins* and *Cuerton*, caused an Insurance to be effected, on the Life of Sir *T. E. Tomlins*, in *Reilly's* name, for 2,000 *l.* ; and that, by and under the appointment of the Commissioners of the Treasury, Sir *T. E. Tomlins* then held the Office or Place of Assistant Parliamentary Counsel to the Commissioners of the Treasury, with a Salary or Allowance of 500 *l.* per annum, payable quarterly ; and that, for the purpose of establishing a fund for the gradual liquidation and discharge of those Debts, and of the annual Premium of the Policy, Sir *T. E. Tomlins* had agreed to assign all his Right and Interest in, and to

the said Allowance or Salary, unto *Reilly* and *James Tomlins*, upon the Trusts after mentioned: It was witnessed that Sir *T. E. Tomlins* did assign, unto *Reilly* and *James Tomlins*, the said Allowance or Salary, to accrue due from the 5th of April 1822, payable, to him, by the Lords of the Treasury, in Trust to retain, apply and dispose of the same, from time to time, as and when the same should be received, in discharge of the Debts before mentioned, and in keeping the Policy on foot; and, after full payment of those Debts, upon Trust to re-assign the Allowance or Salary to Sir *T. E. Tomlins*. In August 1824 *Thomas Tomlins* died, having appointed the Plaintiffs his Executors.

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The Bill was filed against *Reilly*, Sir *T. E. Tomlins* and *Cuerton*. It alleged that *Reilly* had received, under the Trust-Deed, Monies more than sufficient to discharge the Debt due to *T. Tomlins*; that *Reilly* pretended that he had never received any Payments in respect of the Salary, but that, ever since the execution of the Assignment, Sir *T. E. Tomlins* had been permitted, with the consent of *T. Tomlins*, during his life-time, and of the Plaintiffs, since his death, to receive the Salary, upon condition of his paying the Premium upon the Policy; whereas the Plaintiffs charged that neither *Thomas Tomlins*, in his life-time, nor the Plaintiffs, since his death, had acquiesced in or assented to the receipt, by Sir *T. E. Tomlins*, of the Salary; and that *Reilly* had received some of the payments thereof, and might, if he had applied or taken proper steps for that purpose, have received all the payments that had become due since the date of the Assignment. The Bill prayed that the Trusts of the

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Deed might be carried into execution, and that an account might be taken of all Monies received by *Reilly*, in respect of the Salary; and that he might be charged, personally, with such sums as he should not appear to have received, and also with such sums as he had received in respect of the Salary; and that an account might be taken of what was due to the Plaintiffs under the Trusts of the Deed, and that the Plaintiffs might be paid what should be found due to them; and that, in the mean time, a Receiver might be appointed of the Salary.

Reilly, by his Answer, said that Sir *T. E. Tomlins* had paid over to him two quarterly payments of the Salary, but denied that he had received any payment thereof from the Lords of the Treasury: He further said that no Assignment of the Salary, either for the purpose of paying creditors, or for any other purpose, was ever allowed or recognized by the Officers of the Treasury; and that, for that reason, and also because he was advised that the Assignment was, both at Law and in Equity, invalid, he could not, if he had applied or taken proper or any steps for that purpose, have received any of the payments of the Salary, and he submitted to the Court whether the Salary was such an Interest as was capable of assignment in Equity; and whether the Assignment was not wholly void, as well in Equity as at Law. Sir *T. E. Tomlins*, in his Answer, stated that the Officers of the Treasury would not, as he had been informed and believed, allow or recognize the assignment of his Salary; and he submitted that such assignment was altogether void both at Law and in Equity.

A Motion was now made, on behalf of the Plaintiffs, for a Receiver, according to the Prayer of the Bill.

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Mr. *Sugden*, and Mr. *Pemberton*, for the Plaintiffs, in support of the Motion :

It is not disputed that certain payments of his Salary have been made, to *Reilly*, under the Deed. The only ground of opposition is, that this Salary is an Interest which is not assignable. The Defendant *Reilly* is not entitled to make that objection, as he is only a Trustee. This is a Salary for mere work and labour done, and not for work done in a confidential character. It does not resemble half-pay, which is in the nature of a retainer for the future services of the Party.

Mr. *Bickersteth*, and Mr. *G. L. Russell*, for the Defendants *Reilly* and Sir *T. E. Tomlins* :

The question is, whether the Court will appoint a Receiver of a Salary of this nature. It is an Income granted by the Crown, *pro consilio impendendo*. It is for the interest of the Crown that persons, to whom it grants Salaries for services to be performed, should continue to receive those Salaries. The appointment of a Receiver would be nugatory, as no person but Sir *T. E. Tomlins* can receive the Salary. It is not different, in principle, from half-pay. The Court never appoints a Receiver unless he can legally recover. The Assignment is void on grounds of public policy. *Davis v. Duke of Marlborough* (a).

Mr. *Sugden*, in reply :

In *Davis v. The Duke of Marlborough*, the Estates were inalienable, and yet Lord *Eldon* appointed a Re-

(a) 1 Swanst. 74, and 2 Swanst. 108.

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ceiver of the Life-Estates ; because it was not expressly declared that they should not be subject to charges of such a nature as those which the Duke had created. The cases as to half-pay do not apply. If the services are withheld, the Salary ceases.

The VICE-CHANCELLOR :—

It appears to me that this Case does come within the principle of the cases that have been alluded to. The decision in *Davis v. The Duke of Marlborough* turned upon the particular words of the second Act of Parliament mentioned in that case. I think that this Salary is not assignable on grounds of public policy.

Motion refused (*b*).

(*b*) The Vice-Chancellor's decision in the above Case, was afterwards affirmed by the Lord Chancellor; but, on the Cause being heard before the Master of the Rolls, on the 4th of May 1830, his Honor directed a Case to be made for the opinion of the Judges of the Court of Common Pleas, as to whether the Salary was or was not assignable.

PODMORE v. SKIPWITH.

THIS was a suit for Tithes, instituted by a Rector against the Occupiers of Lands in his Parish. Lady *Skipwith*, one of the Defendants, had, in her Answer, stated that a certain Modus was payable for all Tithes within the Hamlet of *Newbold*, which was part of the Parish. An application was now made to the Court, on her behalf, for leave to file a supplemental Answer, for the purpose of confining the Modus to the Tithes of the Pasture Land within the Hamlet.

By an Affidavit in support of the Motion, she deposed that, when she put in her Answer, she was advised that the Modus covered the whole of the Rectorial Tithes in the Hamlet; but that she had since been advised that it covered the Tithes of the Pasture Land only.

The Answer had been replied to; but no Witnesses had been examined.

Mr. *Knight*, in support of the Motion, said that the alteration proposed to be made in the defence was for the benefit of the Plaintiff, as the Defendant sought to narrow her defence; that the Defendant did not seek to vary a fact, but merely to change an inference in point of Law.

Mr. *Spence*, for the Plaintiff, said that the Defendant did not swear, in her Affidavit, that any new fact had

1829:
26th March.
6th & 15th
May.

Tithes.
Supplemental
Answer.

Defendant, in her Answer to a Bill for Tithes, pleaded a Modus for all Tithes. She then discovered that the Modus covered part only of the Tithes, and moved to correct the mistake by filing a Supplemental Answer: Ordered that the Cause should proceed as if the Modus had been laid in the manner proposed.

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come to her knowledge since putting in her Answer: that the only Cases in which the Court had allowed a Defendant to file a supplemental Answer, were where he had become acquainted with facts which were not known to him when he put in his Answer, or where he had stated one fact meaning to state another. *Wells v. Wood* (a).

The *Vice-Chancellor* said that he had some recollection of a Case where a Modus had been stated, and the Parties, having afterwards found that they had made some mistake, applied to Lord *Eldon* for leave to file a supplemental Answer, for the purpose of correcting the mistake; and his Lordship ordered that the Cause should proceed as if the Modus had been laid in the way in which it was proposed (b).

15th May.

On this day the *Vice-Chancellor* ordered that the Cause should proceed, and the Issue between the Parties be considered as if the Modus had been laid in the manner mentioned in the notice of Motion.

(a) 10 Ves. 401.

(b) The name of the case alluded to was not mentioned.

CARRINGTON v. CORNOCK.

THE Plaintiff was the Vicar of the Parish of *Berkeley*, in *Gloucestershire*. The Bill was filed against some of the Occupiers of Lands within the Parish, for an account and payment of certain Small Tithes. The Plaintiff had, some time before, filed a Bill, in this Court, against one *Jones*, and other Occupiers in the Parish, for a similar purpose, except that the last-mentioned Bill included the Tithes of Milk and Foals, which were omitted in the present one. The Defence set up in both Suits was the same, namely, Moduses or customary. Payments. The Answer of the Defendants having been replied to, and the cause being at Issue, the Defendants moved that the depositions of Witnesses taken, by the Defendants, in the Cause of *Carrington v. Jones* and others, both previous and subsequent to the Decree, might be read at the hearing of this Cause against the Plaintiff, saving all just exceptions.

1829:
27th March,
and
25th July.

Practice.
Depositions.

Although there are two Suits in this Court between Parties having the same respective Interests, and relating to the same matters, the depositions of such only of the Witnesses in the prior Suit, as are dead, will be allowed to be read in the subsequent Suit.

In opposition to this Motion the Plaintiff filed an Affidavit, in which he deposed that *Cornock* and *Cox*, two of the Defendants in this Cause, were examined as Witnesses, in the Cause of *Carrington v. Jones* and others, for the Defendants in that Cause: That the Witnesses who were examined in the last-mentioned Cause, were, with a few exceptions, still alive, and capable of being called as Witnesses in the present Cause: That he omitted to join in the Commission taken out, by the Defendants in that Cause, for the exa-

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mination of Witnesses on their behalves, whereby he was debarred from cross-examining the Witnesses produced and examined under that Commission.

Mr. *Bickersteth*, in support of the Motion, cited the *Mayor of London v. Perkins* (a), *Williams v. Broadhead* (b); and said that the reason why the application was refused in *Goodenough v. Alway* (c), was, that the depositions had been taken in another Court.

Mr. *Sugden*, for the Plaintiff:

If the Witnesses are living, is not the Plaintiff to have an opportunity to cross-examine them in this Suit? In *Goodenough v. Alway* the decision did not turn on the other Suit being in the Exchequer, but because it was not between the same Parties. The Tithes demanded in these two Suits are not the same; for the Tithes of Milk and Foals are sought to be recovered in one Suit, and not in the other. *Eade v. Lingood* (d), *Mackworth v. Penrose* (e).

Mr. *Bickersteth*, in reply:

The Bill in this Cause is filed for Tithes of the same Parish, and against Persons standing in the same situation as the Defendants in the former Suit, and though the defence set up in this Suit might have been different from the defence made in the other, yet that is not the case; for the Answer has been put in and replied to in this Cause, and it appears that there is no difference between the defences made in the two Suits.

(a) 3 Bro. P. C. 602.

(d) 1 Atk. 203, 204.

(b) 1 Sim. 151.

(e) 1 Dick. 50.

(c) 2 Sim. & Stu. 481.

[The *Vice-Chancellor* :—It appears that the Witnesses, whose depositions were sought to be read in the *Mayor of London v. Perkins*, were all dead.]

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As the order is applied for, saving all just exceptions, if it appears that any of the Witnesses, whose depositions are proposed to be read, are living, their testimony may be objected to. The only objection made by the Plaintiff, is that he did not cross-examine the Witnesses ; but it was his own neglect, and the Defendants are not to be prejudiced by it.

The VICE-CHANCELLOR :—

If it appears that any of the Witnesses in the Cause of *Carrington v. Jones* are dead, the Court will order that their depositions may be read in this Cause, saving just exceptions. But, before the Court can make that order, it ought to appear, by Affidavit, which of the Witnesses are dead.

An Affidavit was afterwards made, by the Solicitor for the Defendants, stating that five of the Witnesses in *Carrington v. Jones*, whose names were mentioned, were dead ; upon which the Court ordered that the Defendants should be at liberty to read, at the hearing of the Cause, the depositions of those five Witnesses, saving just exceptions.

25th July.

MEMORANDA.

Mr. Knight in arguing a case of *Cliffe v. Wilkinson*, in Hil. Term 1831, stated that Sir *Anthony Hart*, on a day subsequent to that on which he had made the order in *Camac v. Grant*, *ante* vol. i. 348, had directed that the order should not be drawn up, as he did not consider himself to be warranted, by the practice of the Court, in making it.

The Decision in *Prebble v. Boghurst*, reported *ante*, p. 246, was affirmed by Lord *Lyndhurst*, C. on the 22d day of Nov. 1830.

The question that arose in *Williams v. Thorp*, reported *ante*, p. 257, again came before the Court, upon the hearing of a Bankrupt Petition, *ex parte Colville*, in the matter of *Severn*, at the Sittings after Michaelmas Term, 1830. On the 10th of January 1831, The *Vice-Chancellor* delivered Judgment, in which he adhered to his Decision in *Williams v. Thorp*, and concluded by saying that, upon the whole he was bound to declare the Law to be that, where a person who has effected an Insurance on his Life, assigns the Policy and delivers it to the Assignee, but does not give notice of the Assignment to the Insurers, if he afterwards becomes Bankrupt, the Assignment is void as against the Assignees under the Commission.

To the case referred to *ante*, p. 454, note (a), add *Thring v. Edgar*, 2 Sim. & Stu. 274, *Sanders v. King*, *ibid* 277, and *Pennington v. Beechey*, *ibid* 282.

The case of *Jones v. Yates*, referred to *ante*, p. 470, note (h) is reported in 2 Young & Jer. 373.

A N

I N D E X

TO THE

P R I N C I P A L M A T T E R S.

ACCOUNT.

A trustee of a charity-estate, who has used the balances of the rents in carrying on his trade, will be charged with interest, at five per cent, but not with annual rests. [*The Attorney-General v. Solly*]

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See MUTIPARIOUSNESS.

ACTION.

See INJUNCTION, 4.—PLEA AND PLEADING, 8, 9.

ADMINISTRATION.

See APPLICATION OF PAYMENTS.—INJUNCTION, 4.—SPECIALTY DEBTS.

ADMITTANCE.

See COPYHOLD.

AGREEMENT.

1. An agreement between two sons, to divide equally whatever property they may receive from their father in his life-time, or become entitled to under his will, or by

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descent or otherwise, from him, is not contrary to public policy, but will be enforced in equity. [*Wethered v. Wethered*] - 183

2. An agreement between two persons, having expectations from a third, to divide equally whatever he might leave them, is valid. [*Harwood v. Tooke*] - - 192

See COSTS, 3.

ALIENATION.

Testator declared trusts of stock for A. for life, and after his decease for his children, and declared that the provision he had made for A. should not be subject to any alienation or disposition by him, but if he should alienate, or attempt to alienate, it should operate as a forfeiture of the provision, and the same should devolve on the person next entitled. A. who had several children, became bankrupt: Held, that his assignees were entitled to his life-interest. [*Lear v. Leggett*] - - - 479

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AMENDMENT.

1. Motion for leave to amend, without prejudice to a *ne exeat*, refused. [*Grant v. Grant*] - - - - 14
 2. The 13th order does not apply to a case in which the answer was filed before the first day of Easter Term 1828. [*Harris v. Harrison*] - - - - - 431
 3. Leave given to amend a bill without prejudice to an injunction obtained on the filing of the bill. [*Pickering v. Hanson*] - - 488
- See DISMISSAL OF BILL, 1. 3.—
PRACTICE, 4. 8. 15. 19, 20, 21.

ANNUAL RESTS.

See ACCOUNT.

ANNUITY.

See CHOSE IN ACTION, 1.

ANSWER.

See SUPPLEMENTAL ANSWER.

APPLICATION OF
PAYMENTS.

In the progress of a suit for the administration of a testator's assets, which were more than sufficient to pay the legacies with interest, it was ordered that the Master should ascertain one fourth part of the legacies and interest, and that the same should be paid out of a fund in the cause: Held, that the payment ought to be applied, first, in discharge of the whole of the interest on the legacies, and

then in the reduction of one fourth of the principal. [*Thomas v. Montgomery*] - - - - 348

APPOINTMENT.

By Mr. and Mrs. P.'s Marriage Settlement, estates in *Kent* and other counties, the Lady's property, were settled on her for life, remainder to Mr. P. for life, if she should so appoint, remainder to their children, remainder as Mrs. P., by deed under her hand and seal, attested, &c., or by her will, signed and published in the presence of three witnesses, should appoint; remainder to Mrs. P. in fee, with a power of sale, and directions for re-investing the proceeds in other estates, and in the usual securities, in the interim, and upon the re-investment, the uses of the settlement were to cease as to the sold estates. Mrs. P., by deed executed in the presence of three witnesses, but not attested, (at the foot of which she had written, without date, directions for her burial), appointed the estates, after her decease, to her husband for life, and in default of children, to him in fee; and she revoked a prior deed of appointment. The estates were afterwards sold, and the proceeds invested in securities, but were never re-invested in lands, although their liability to be so was recognized by the parties. There was no issue of the marriage. Mrs. P. survived her hus-

band, and applied part of the proceeds to her own use. At her death, she was seised (exclusive of the settled property) of a mansion-house, with outbuildings, gardens, and a small field adjoining it, and some cottages opposite to it, let to tenants, and was possessed of some personal estate, no part of which was in the name of a trustee. She devised the mansion-house, with its appurtenances, and all other her messuages, lands, &c. to C. S., and bequeathed all her personal estate, whether in the name of herself or of any trustee, subject expressly to her debts and legacies, to other persons. After her death, the deed of appointment was found, in her house, with the title deeds of the mansion-house; but the revoked deed could not be found. Her debts and legacies greatly exceeded her assets. Held, that the former deed was not a testamentary instrument, and that Mrs. Pyott's receiving part of the proceeds of the settled estates, was not an entry or claim within the 54 G. 3, c. 118, but that that statute remedied the defect of attestation: that the remaining proceeds remained as real estate, but did not pass either to the devisee or the residuary legatees in the will: that Mr. P.'s co-heirs in gavelkind were not entitled to any part, but that the whole belonged to his heir at law, under the appointment. [*Hougham v. Sandys*] - - 95

2. Testator gave 3,000 *l.* to trustees for C. S. for life; remainder to such persons as she should appoint. C. S. by her will, disposed of all her personal estate, and then gave all sums, messuages, &c. and other interest to which she was entitled under the testator's will: Held, that the latter gift was a good execution of the power. [*Maples v. Brown*] - - - - - 327
3. A. having a power to appoint 10,000 *l.* amongst his younger children, appoints it to them equally, reserving to himself a power of revocation as to 5,000 *l.*, which he afterwards irrevocably appoints to E., one of the children, in consideration of her having agreed to apply part of it in payment of his debts. Afterwards A., by a deed, to which E. is also a party, revokes, with her consent, the last appointment, as to 2,500 *l.*, and, in pursuance of all powers, appoints that sum to a child by a second Marriage, and confirms E.'s title to the remainder under the former appointment: Held, that the appointment of the 5,000 *l.* being void, the appointment of 2,500 *l.* must also fail. [*Farmer v. Martin*]

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See POWER.

APPROPRIATION.

A receiver of an estate in Jamaica, appointed by the Court of Chancery there, in a suit, by a second incumbrancer, to have the pro-

ceeds of the estate applied in satisfaction of the incumbrances, was ordered, out of the first proceeds, to pay to A. the first incumbrancer, in London, the interest on her charge, and to consign the produce to B. the plaintiff, a merchant in England, for sale. The receiver, on making the first consignment, sent the bill of lading to A., with directions to deliver it to B., on payment of her interest. The consignments were afterwards made, by B.'s direction, to other merchants, who, for several years, continued to pay A. her interest; but afterwards ceased to do so. Upon which she filed a bill in this country, against them, the receiver and the owners of the estate, for an account of the consignments and payment of her interest, charging collusion between the consignees and the receiver.

Demurrer, by the consignees, for want of equity, over-ruled. [*Fitzgerald v. Stewart*] - - - 333

ASSIGNABLE INTEREST.

See SALARY.

ASSIGNEES.

See BANKRUPT.

ASSURANCE.

See POLICY OF ASSURANCE.

ATTACHMENT.

1. Where a defendant, after notice of the plaintiff's intention to issue

an attachment unless an order for time is obtained, procures the order, but is unable, on account of the press of business, to get it drawn up, and omits to give the defendant notice of the order until an attachment is sealed, he cannot set aside the attachment. [*Kirkpatrick v. Meers*] - - - 16

2. An attachment for non-appearance to a subpoena, served in Guernsey, is irregular. [*Fernandez v. Corbin*]

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See PRACTICE, 8.

BANKRUPT.

1. The assignment of a policy of assurance on a life does not take it out of the order and disposition of the assignor, if no notice of the assignment is given to the insurers. [*Williams v. Thorp*] 257. See p. 570
2. Husband and wife made a post-nuptial settlement, in 1821, of monies due to the wife. The monies were received by the trustees, and invested in their names. The husband was a trader, and had committed acts of bankruptcy prior to the settlement. In 1823 he was declared bankrupt: Held, that his assignees were entitled to the fund. The 6 Geo. 4, c. 16, s. 73, has no retrospective operation. [*Wombwell v. Laver*] 360
3. Testator declared trusts of stock for A. for life, and, at his decease, for his children, and declared that the provision he had made for A.

should not be subject to any alienation or disposition by him; but if he should alienate, or attempt to alienate, it should operate as a forfeiture of the provision, and the same should devolve on the person next entitled. A., who had several children, became bankrupt: Held, that his assignees were entitled to his life interest. [*Lear v. Leggett*] - - - - - 479

4. The defendant, in his answer to a bill filed by the assignees of a bankrupt, alleged that the plaintiffs had not obtained the necessary consent to the institution of the suit; upon which the plaintiffs filed a supplemental bill, stating that, since the filing of the original bill, they had obtained the necessary consent. Demurrer to the supplemental bill allowed. [*King v. Tullock*] 469
See p. 570.

See HUSBAND AND WIFE, 2.

BILL OF EXCHANGE (Lost).

A bill will lie by the last indorsee of a lost bill of exchange to recover the amount from the acceptor; and prior indorsees need not be made parties to the suit. [*Macartney v. Graham*] - - - - - 285

BILL TO PERPETUATE TESTIMONY.

A motion to dismiss a bill to perpetuate testimony for want of prosecution is irregular; the proper application is, that the plaintiff

may proceed within a given time, or pay the defendant his costs. [*Wright v. Tatham*] - - - 459
[*Barham v. Longman*] - - - 460

CHARITY.

1. Where charity estates are directed by the founder to be leased for twenty-one years, the court has no authority to order them to be leased for ninety-nine years. [*The Attorney-General v. The Mayor of Rochester*] - - - - - 34
2. A bequest of a sum of money to pay off a debt secured, by an equitable charge only, upon a meeting-house is void. [*Waterhouse v. Holmes*] - - - - 162
3. A grant from the Crown to a city of certain privileges and property, for the defence and preservation of peace within the city, is a charitable gift: *Semble*. [*The Attorney-General v. the Mayor and Corporation of Carlisle*] - - - - 437

See TRUSTEE.

CHOSE IN ACTION.

1. The court has no jurisdiction to order, upon motion, a person not a party in the cause, to pay into court the arrears of an annuity granted by him to a defendant against whom a sequestration has issued for want of a sufficient answer, unless the grantor has, by his conduct, waived the objection to the jurisdiction. But he may, notwithstanding, and without applying for the leave of the court,

obtain from the grantee a release of the annuity. [*Johnson v. Chippindall*] - - - - - 55

2. A man whose wife was entitled to personalty, subject to a life-interest in A. becomes bankrupt, and afterwards obtains his certificate; then A. dies, and afterwards the wife, and the husband takes out administration to her: held, that his assignees are nevertheless entitled to the property. [*Ripley v. Woods*] - - - - - 165

3. The husband of a woman, having a vested interest in possession in a legacy, becomes bankrupt; his assignee files a bill against the testator's executors, to compel payment of the legacy, and soon afterwards the husband dies: Held, that the widow, and not the assignee, is entitled to the legacy. [*Pierce v. Thornely*] - - - 167

See BANKRUPT, 1.

COLONY.

See REVOLTED COLONY.

COMPENSATION.

An estate consisting of fen land, and so described in the particulars of sale, was charged, by a local but public Act of Parliament, with drainage and embanking taxes, of which the purchaser had no express notice: Held, that he was not entitled to a compensation for those taxes. [*Barraud v. Archer*]

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See SPECIFIC PERFORMANCE.

CONSIGNEES.

A receiver of an estate in Jamaica, appointed by the Court of Chancery there, in a suit by a second incumbrancer, to have the proceeds of the estates applied in satisfaction of the incumbrances, was ordered, out of the first proceeds, to pay to A. the first incumbrancer, in London, the interest on her charge, and to consign the produce to B. a merchant in England, for sale. The receiver, on making the first consignment, sent the bill of lading to A. with directions to deliver it to B., on payment of her interest. The consignments were afterwards made, by B.'s direction, to other merchants, who, for several years, continued to pay A. her interest; but afterwards ceased to do so. Upon which she filed a bill in this country, against them, the receiver and the owners of the estate, for an account of the consignments and payment of her interest, charging collusion between the consignees and the receiver.

Demurrer, by the consignees, for want of equity, over-ruled. [*Fitzgerald v. Stewart*] - - - 333

CONSOLIDATION OF SUITS.

Motion by defendants in tithe-suits, in all of which the same defence was made, that the suits might be consolidated, refused. [*The Warden and Fellows of Manchester College v. Isherwood*] - - 476

CONSTRUCTION.

1. A native of Scotland, domiciled in England, having personal property only, executed, during a visit to Scotland, and deposited there, a will prepared in the Scotch form, and died in England : Held, that the will was to be construed according to the English law. [*Anstruther v. Chalmers*] - - 1
2. Testator directed his executors to purchase, out of his residuary estate, a certain sum of stock, and to pay the dividends to his wife for her life, and, after her death to divide the capital between such of his three daughters as should be then living ; provided that if any one of them should be then dead, or should afterwards die before her share should become payable or divisible, leaving a child or children, that share should go to such child or children. The testator's wife died in his lifetime. One of the daughters died three months after the testator : Held, nevertheless, that she had a vested interest in one of the shares. [*Collins v. Macpherson*] - - 87
3. Bequest of 40 *l.* per annum to A. for life, and after her decease, to B. or his heirs : Held, that "or" must be construed disjunctively ; and that, therefore, B. did not take an absolute interest in the annuity. [*Girdlestone v. Doe*] 225
4. Devise to A. for life, and to her heirs the issue of her body, for ever, for their lives ; and in case A. has no son, then to her eldest daughter ; followed by a proviso, containing a devise over, if A. left no issue, or they should become extinct, creates an estate tail in A. [*Reece v. Steel*] - - - 233
5. Devise to A. and her heirs, but if she died, leaving issue, then to such issue and their heirs. A. died, leaving issue : Held, that her husband was not entitled to be tenant by the curtesy. [*Barker v. Barker*] - - - - - 249
6. Testator gave to his heir one shilling, and devised to W. B. all his lands ; and, in the next sentence, gave to him all his goods, chattels, personal and testamentary estate : Held that the fee-simple of the lands passed to W. B. [*Bradford v. Belfield*] - - 264
7. Devise to A. B. C., &c. share and share alike, for their lives, remainder to their respective children, for their lives, and so to be continued, from issue to issue, for life. But, if any of them die, leaving no issue, their shares to go to the survivors, for their lives, and the issue of such of them as shall be dead, and, for default of any issue, then over : Held, that A. B. C., &c. take estates tail, with cross-remainders. [*Mortimer v. West*] - - - - - 274
8. A testator in designating the objects of a power of appointment given to his daughter, used the words "issue," and "child or

- children," synonymously. In a subsequent part of his will, he gave his son a power of appointment over a different part of his property, and, in pointing out the objects of it, used the word "issue" simply; the son had both children and grandchildren living at his death: Held, that an exercise of the power in favour of the former only, was void. [*Dalzell v. Welch*] - - - - - 319
9. Testator gave to his widow a life-interest in a fund, with a power of appointment amongst all his children living at her death; and, in default of appointment, directed the fund to be divided amongst all *such* children, with a gift over to the widow, in case all the children died before their shares became payable.
- The widow appointed the fund to the two surviving children; one of them died in her life-time: Held, that the only surviving child took, upon the widow's death, the whole of the fund. [*Bielefield v. Record*] 354
10. Testator declared trusts of stock for A. for life, and after his decease, for his children, and declared that the provision he had made for A. should not be subject to any alienation or disposition by him, but if he should alienate or attempt to alienate, it should operate as a forfeiture of the provisions, and the same should devolve on the person next entitled. A., who had several children, became bankrupt: Held, that his assignees were entitled to his life-interest. [*Lear v. Leggett*] - - - - 479
11. Testator gave to his daughter and her children 5,000*l.*; 3,000*l.* to be paid in one year after his decease, and 2,000*l.* after the decease of his wife, and appointed A. B. trustee of those sums for his daughter and her children. The Court declared the 5,000*l.* to be in trust for the daughter for life, and after her decease for all her children, whether born in the testator's lifetime, or after his decease. [*Morse v. Morse*] - 485
12. Bequest to H. D. for his own use, and in case he should die in the testator's life-time, or afterwards, without having any child or children, then over. H. D. survived the testator, and died without having had a child: Held, that the gift over took effect. [*Stone v. Maule*] - - - - 490
13. J. B. at his death had a balance due from his banker and was also entitled to a share of the balance due to A. B. from his banker, A. B. having received monies for him from time to time, and, with his knowledge, paid them to his own banker. But J. B. had no concern with A. B.'s bankers, nor did they know he was interested in the monies paid by A. B. J. B. bequeaths all his money in the hands of any banker: Held, that his balance at his own bankers, and also

his share of A. B's. balance will pass; and that evidence is admissible to show that he so intended. [*Heming v. Whitman*] - - 493

14. A testator, who had long resided in India, gave a legacy to T. P., "who resided at A. when I left England, or to his heirs, executors, administrators or assigns." T. P. died in the testator's lifetime: Held, that the bequest over was void for uncertainty. [*Waite v. Templer*] - - - - 524

See LEGACY, 1. 2.—LEGACY DUTY.

CONSTRUCTION OF ORDER.

A motion for a new trial must be made before the same jurisdiction as directed the former trial, although the judge may have been removed. [*Footner v. Figes*] 319

See PRACTICE, 14.

CONTEMPT.

See PRACTICE, 11.

CONVERSION.

Testator gave a copyhold estate to trustees for his wife, until the leases to which it was subject expired, and directed that then it should be sold, and the proceeds be invested for the benefit of his children; but if his wife should die before the leases expired, that it should be immediately sold, and the proceeds disposed of as before. The wife survived the children, but died before the leases expired. The surviving trustee, who claimed the estate for his own benefit, was

decreed to surrender it to the administrator of the children, but without prejudice to the rights of the customary heirs of either the testator or the children, if any such heirs were in existence. [*Burton v. Hodsoll*] - - - - 24

COPYHOLD.

A copyhold estate will not pass by the will of a deviser, who dies before admittance. [*King v. Turner*]

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See CONVERSION.—INFANT TRUSTEE.—PRIORITY OF INCUMBRANCES.

COPYRIGHT.

The Court will not protect a foreigner's copyright. [*Delondre v. Shaw*]

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COSTS.

1. The Master was ordered to tax the costs of all parties, and the amount was directed to be paid, out of the assets of the testator in the cause, by his executors, who were to be at liberty to pay the costs of certain parties to A. B., their solicitor. A. B. was an attorney of K. B. and C. P., but had never been admitted as a solicitor in the Court of Chancery; and the Master, for that reason, disallowed the whole of his charges, except what he had paid to his clerk in court. He had, however, previously received from his clients to the full amount of his bills. The clients then petitioned for an order on the Master to review his certificate, and tax A. B.'s bills;

- but their petition was dismissed.
 [*Prebble v. Boghurst*] 246. See page 570.
2. Injunction granted to restrain an action for the amount of a solicitor's bill, which had been taxed after the commencement of the action, and more than one sixth had been taken off, but the costs of taxation had not been ascertained.
 [*Wallon v. Johnson*] - - - 456
 3. One of the terms of an agreement was, that the contract should be void if the purchaser's counsel should be of opinion that a marketable title could not be made by a certain time. The counsel being of that opinion, a bill, by the purchaser, for a specific performance, with a compensation, was dismissed with costs. And an application, afterwards made by the plaintiff, that his deposit might be set off against the defendant's costs, and the surplus (if any) paid to him, was refused, with costs.
 [*Williams v. Edwards*] - - 78
 4. A first incumbrancer having a power of sale, but having lost the title deeds, institutes a suit to have the estate sold; the subsequent incumbrancers are entitled to be paid their costs, although the proceeds of the sale are not sufficient to pay what is due to the plaintiff.
 [*Wontner v. Wright*] - - 543
- See BILL TO PERPETUATE TESTIMONY, 1.—PRACTICE, 20.
- CROSS-EXAMINATION.
- A party who omits to cross-examine a witness under a commission at

the usual period, will be allowed to exhibit interrogatories for that purpose on a subsequent day.
 [*Carter v. Draper*] - - - 53

CROSS-REMAINDERS.

See WILL, 8.

DAMAGES.

See INJUNCTION, 4.—TENANT FOR LIFE, and REMAINDER-MAN.

DEBTS.

See TENANT FOR LIFE.

DEBTOR AND CREDITOR.

See PRINCIPAL AND SURETY.—
 SPECIALTY DEBT.

DEFENDANT.

If a defendant pleads that giving the discovery sought by the bill, will subject him to penalties, but, between the filing and the hearing of the plea, the time for suing for the penalties expires, the plea will be over-ruled. [*The Corporation of Trinity House v. Burge*] - 411

See ATTACHMENT.—PLEADING, 2.

3. 4.—PRACTICE, 13.—SUPPLEMENTAL ANSWER.

DEMURRER.

Leave given to file a general demurrer after the second order for time had been taken out, the subpoena having been made returnable immediately, and there having been no wilful delay on the part of the defendants. [*The Attorney-Gen-*

ral v. The Mayor and Corporation of Carlisle] - - - - 427

See CONSIGNEES.—EQUITY, 1, 3.—JOINT STOCK COMPANY.—JURISDICTION, 4.—MULTIFARIOUSNESS.—PLEADING, 3, 4.—PUBLIC POLICY, 3, 4.—SUPPLEMENTAL BILL.

DEPOSITIONS.

Although there are two suits in this court between parties, having the same respective interests, and relating to the same matters, the depositions of such only of the witnesses in the prior suit as are dead will be allowed to be read in the subsequent suit. [*Carrington v. Cornock*] - - - - 567

DISCLAIMER.

To a bill praying a re-conveyance of four estates, the defendant put in a plea of a fine as to one, concluding with a disclaimer as to the others: the plea was over-ruled. [*Watkins v. Stone*] - - - 49

DISCOVERY, BILL OF.

See PLEADING, 1, 3.—STATUTE OF LIMITATIONS.

DISMISSAL OF BILL.

1. Amendment of a bill without serving a subpoena to answer the amendments, will not prevent the defendant from dismissing the bill. [*Bramston v. Carter*] - - 458
2. On the 28th November plaintiffs filed a replication, and, on the 29th, a subpoena to rejoin, returnable immediately, tested on the 27th, but without obtaining an order for

a subpoena so returnable; afterwards the defendant obtained an order to dismiss: Held, that the subpoena was irregular, and a motion to discharge the order of dismissal was refused. [*Brown v. Moore*] - - - - 464

3. If, between the giving of a notice of motion to dismiss, and the making of the motion, plaintiff obtains an order to amend, the plaintiff must pay the costs of the motion; but no order will be made upon it. [*Davenport v. Manners*] - 514

See BILL TO PERPETUATE TESTIMONY, 1.—VENDOR AND PURCHASER, 6.

DISSENTERS.

See JURISDICTION, 5.

DOMICIL.

A native of Scotland domiciled in England, having personal property only, executed, during a visit to Scotland, and deposited there, a will, prepared in the Scotch form, and died in England: Held, that the will was to be construed according to the English law. [*Anstruther v. Chalmers*] - - - 1

EQUITY.

A., the inventor of a medicine, employed B., a foreigner residing abroad, to manufacture it for him there, and sold it in England for his own sole profit. A label and seal, denoting that the medicine was manufactured by B. and sold by A., were affixed to the bottles in which it was sold. The

defendants imitated the labels and seals. Demurrer allowed to a bill to restrain the imitation, and for an account of the sales of the spurious label and seals, A. having no interest. [*Delondre v. Skew*]

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2. A bill will lie by the last indorsee of a lost bill of exchange to recover the amount from the acceptor; and prior indorsees need not be made parties to the suit. [*Macartney v. Graham*] - - - 285

3. A receiver of an estate in Jamaica, appointed by the Court of Chancery there, in a suit by a second incumbrancer, to have the proceeds of the estates applied in satisfaction of the incumbrances, was ordered, out of the proceeds, to pay to A., the first incumbrancer, in London, the interest on her charge, and to consign the produce to B., a merchant in England, for sale. The receiver, on making the first consignment, sent the bill of lading to A., with directions to deliver it to B. on payment of her interest. The consignments were afterwards made, by B.'s direction, to other merchants, who, for several years, continued to pay A. her interest; but afterwards ceased to do so. Upon which she filed a bill in this country against them, the receiver and the owners of the estate, for an account of the consignments and payment of her interest, charging collusion between the consignees and the receiver.

Demurrer, by the consignees, for want of equity, overruled. [*Fitzgerald v. Stewart*] - - - 333

4. A receiver appointed in a suit instituted by incumbrancers was ordered to keep down the incumbrances out of the rents, and to pay the residue to the owner of the estate. A judgment-creditor of the owner of the estates, subject to the incumbrances, may file a bill against the owner and receiver, without making the other incumbrancers parties, to have his debt satisfied out of the surplus rents. [*Lewis v. Lord Zouche*] 388

See AGREEMENT, 1, 2.—JOINT STOCK COMPANY, 1.—JURISDICTION, 4.—LANDLORD AND TENANT.

EQUITY OF REDEMPTION.

See PARTIES, 5.

ESCHEAT.

See CONVERSION, 1.

EVIDENCE.

A terrier is evidence as to personal tithes. [*Townley v. Colegate*] 297

See DEPOSITIONS.—WILL, 12.

EXAMINATION OF WITNESSES.

See WITNESSES.

EXECUTOR.

An executor filed a bill before probate; plea, that he had not proved the will, allowed. [*Simons v. Milman*] - - - - - 241

See CHOSE IN ACTION, 3.—

INJUNCTION, 4.

FINE.

See PLEA AND PLEADING, 2.

FORECLOSURE.

See PLEA AND PLEADING, 10, 11.

FOREIGN LOAN.

See USURY.—PUBLIC POLICY, 4.

FOREIGNER.

See COPYRIGHT.

FORFEITURE.

See ALIENATION.

FRAUD.

The holders of shares in a joint-stock company, purchased immediately from the company, are entitled to relief, in equity, against the fraudulent conduct of the directors. [*Blain v. Agar*] - - - 289

GUARDIAN.

Where three joint guardians are appointed, and one dies, the survivors will be appointed guardians without a reference. [*Hall v. Jones*]

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GUATEMALA LOAN.

See USURY.

HUSBAND AND WIFE.

1. The husband of a woman, having a vested interest in possession in a legacy, becomes bankrupt; his assignee files a bill against the testator's executors, to compel payment of the legacy; and soon afterwards the husband dies: Held, that the widow, and not the assignee, is entitled to the legacy. [*Pierce v. Thornely*] - - - 167
2. A man, whose wife was entitled

to personalty, subject to a life-interest in A., becomes bankrupt, and afterwards obtains his certificate; then A. dies, and afterwards the wife, and the husband takes out administration to her: Held, that his assignees are nevertheless entitled to the property. [*Ripley v. Woods*] - - - - - 165

See BANKRUPT, 2.—TENANT BY THE CURTESY.

INCUMBRANCER.

See APPROPRIATION.—CONSIGNEES.—COSTS, 4.—JUDGMENT CREDITOR.—PRIORITY OF INCUMBRANCES.

INDORSEE.

See PARTIES, 1.

INFANT.

See GUARDIAN.—PARENT AND CHILD.—PRACTICE, 11.

INFANT TRUSTEE.

A copyholder covenants to surrender to trustees, in trust to sell, and dies before surrender, leaving an infant heir, the covenantees agree to sell the estate, and afterwards file a bill for a specific performance: Held, that the heir is not an infant Trustee within 6 Geo. 4, c. 74, and therefore cannot be ordered to surrender immediately, and consequently that the bill must be dismissed, with costs. [*King v. Turner*] - - - - - 549

INJUNCTION.

1. Motion by a plaintiff to restrain an action brought by one defendant against a co-defendant, granted. [*Kingham v. Maissey*] - - - 41

2. Injunction granted to restrain an action for the amount of a solicitor's bill, which had been taxed after the commencement of the action, and more than one sixth had been taken off, but the costs of taxation had not been ascertained. [*Walton v. Johnson*] 456
 3. Motion refused to dissolve an injunction granted, on affidavit and certificate, to restrain execution on a judgment obtained by the defendant against the plaintiff, the latter having obtained a judgment to a greater amount against the former. [*Williams v. Davies*] 461
 4. If a cause for the administration of assets has been heard for further directions, and the executors have paid their balances into Court, an injunction will be granted to restrain an action against the executors, for breaches of covenant in a lease granted to the testator, and the Master will be directed to ascertain the damages. [*Sutton v. Mashiter*] - - - - 513
 5. The common injunction is not dissolved by the plaintiff obtaining an order to amend without saving the injunction, unless the record is altered. [*Davis v. Davis*] - 515
 6. Courts of equity have a concurrent jurisdiction with the courts of law in relieving against promissory notes taken when over-due. [*Hodgson v. Murray*] - - 515
- See COPYRIGHT.—EQUITY, 1.—JURISDICTION, 5.—LANDLORD AND TENANT.—PRINCIPAL AND SURETY, 3.—PRACTICE, 7, 8.

INTEREST.

1. Purchaser of a reversion ordered to pay interest on his purchase-money from the time of his purchase. [*Trefusis v. Lord Clinton*]

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See ACCOUNT.—TENANT FOR
LIFE OF RESIDUE.

INTERROGATORIES.

See CROSS EXAMINATION.

ISSUE.

Issue directed on the application of a vicar to try the right to tithes. [*Townley v. Colegate*] - - 297

JOINT STOCK COMPANY.

1. The holders of shares, in a joint-stock company, purchased immediately from the Company, are entitled to relief, in equity, against the fraudulent conduct of the directors. Some of the shareholders in a joint-stock company may file a bill to have their deposits repaid without making all the other shareholders parties, if they are ignorant of their names. [*Blain v. Agar*] 289
2. Some of the members of a partnership cannot file a bill, on behalf of themselves and the others, for a dissolution of the partnership; but all the members, however numerous, must be parties to the suit. [*Long v. Yonge*] - - - 369
3. An Act of Parliament for forming a joint-stock company, authorized all suits, on behalf of the company, against any person, to be commenced in the name of the chair-

man, and in all proceedings in which it would have been before necessary to state the names of the partners, it was made sufficient to state the name of the chairman only. Held, that the Act did not authorize suits to be commenced by the chairman against one of the the partners, without making the others parties. [*Mac Mahon v. Upton*] - - - - - 473

JUDGMENTS.

1. Motion refused to dissolve an injunction, granted on affidavit and certificate, to restrain execution on a judgment obtained by the defendant against the plaintiff, the latter having obtained a judgment to a greater amount against the former. [*Williams v. Davies*] - - 461
2. Old judgments existing against a former owner of leaseholds, who parted with the property in 1770, and to enforce which no steps appeared to have been taken, are no objection to the title. [*Causton v. Macklew*] - - - - - 242

JUDGMENT CREDITOR.

A receiver appointed in a suit instituted by incumbrancers was ordered to keep down the incumbrances out of the rents, and to pay the residue to the owner of the estate. A judgment creditor may file a bill against the owner and receiver, without making the other incumbrancers parties, to have his debt satisfied out of the surplus rents. [*Lewis v. Lord Zouche*]

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JUDICIAL KNOWLEDGE.

See PUBLIC POLICY, 3, 4-

JURISDICTION.

1. The Court has no jurisdiction to deprive a father, living in adultery, of the custody of his child, unless he brings the child in contact with the woman with whom he is so living; nor to order him to permit the mother to have access to the child, unless misconduct on his part is shown with reference to the management and education of the child. [*Ball v. Ball*] - - 35
2. The Court will not exercise its summary jurisdiction to compel a vendor's solicitor to perform an undertaking, given by him at the sale, to do certain acts for clearing the title to the estate. [*Peart v. Bushell*] - - - - - 38
3. The Court has no authority to advance part of the fund in the cause to enable indigent parties to prosecute their claims to it. [*Peck v. Beechey*] - - - - - 40
4. Courts of equity have a concurrent jurisdiction with the courts of law in relieving against promissory notes, &c. taken when over-due. [*Hodgson v. Murray*] - - 515
5. The Court will not interfere to prevent the removal of the minister of a dissenting chapel, vested in trustees, when the deed is silent as to the mode of electing the minister and his continuance in office, and contains no provision for his support, but he is dependent for it on the voluntary contributions of

his flock. [*Porter and others v. Clarke and others*] - - - 520

See INJUNCTION, 2, 3. 6.—SEQUESTRATION.—SOLICITOR.

LANDLORD AND TENANT.

Testator devised an estate to several persons for their lives, successively, with power to grant leases, under certain restrictions. The first tenant for life grants a lease to a person who had no notice of the power, or that the lessor was tenant for life only. A subsequent tenant for life brings an ejectment against the lessee, on the ground that the lease was not made according to the power. The Court will not prevent the lessee from setting up an old outstanding term created by the testator. [*Goleborn v. Alcock*] - - - - - 552

LEGACY.

1. A testatrix, by her will, gave to T. S. 50s. a month during his life, in lieu of his giving up all other notes and claims; and, by a codicil, she gave him 3*l.* a month during his life, and concluded by directing that all other things should be paid and done as directed by her will. Held, that T. S. was entitled to both the monthly payments. [*Lord v. Sutcliffe*] - - - 273
2. Testator, by his will, gave an annuity payable out of his freehold, copyhold and personal estate; and, by a codicil not duly attested, revoked the annuity. Held, that it was a subsisting charge upon the

freeholds. [*Mortimer v. West*] 274

3. In the progress of a suit for the administration of the testator's assets, which were more than sufficient to pay the legacies with interest, it was ordered that the Master should ascertain one fourth part of the legacies and interest, and that the same should be paid out of a fund in the cause. Held, that the payment ought to be applied, first, in discharge of the whole of the interest on the legacies, and then in the reduction of one fourth of the principal. [*Thomas v. Montgomery*] - 348
See CHOSE IN ACTION, 3.

LEGACY DUTY.

An annuity, given by a will, clear of all deductions, was directed to be paid out of certain sums of stock standing in the testator's name: Held, that it was not subject to the legacy duty. [*Dawkins v. Tatham*] 492

LIMITATIONS.

See STATUTE OF LIMITATIONS.

LOST INSTRUMENT.

See PARTIES, 1.

MESSENGER.

See PRACTICE, 2.

MILLS.

See TITHES, 1, 2, 3, 4.

MODUS.

See PRODUCTION OF DOCUMENTS.—TITHES, 6.

MORTGAGE.

See PARTIES, 6.—PLEA AND
PLEADING, 10, 11.

MORTMAIN.

A bequest of a sum of money to pay
off a debt secured, by an equitable
charge only, upon a meeting-house,
is void. [*Waterhouse v. Holmes*]
162

MULTIFARIOUSNESS.

1. The infant heir and only son of an
intestate, joined with his sisters in
a bill, against their mother, the
administratrix, for an account of
the intestate's real and personal
estate.

Demurrer, for multifariousness, al-
lowed. [*Dunn v. Dunn*] - 329

2. A. B. and C. being the next of
kin, and B. and C. the co-heirs of
an intestate, file a bill against D.
for an account of the real and per-
sonal estates of the intestate. The
bill is multifarious. [*Maud v. Ack-
lom*] - - - - - 331

NE EXEAT.

See AMENDMENT, 1.

NEW TRIAL.

A motion for a new trial must be
made before the same jurisdiction
as directed the former trial, al-
though the judge may have been
removed. [*Footner v. Figes*] 319

NOTICE.

See COMPENSATION.—POLICY OF
ASSURANCE.—PUBLIC POLICY,
3, 4.

OLD JUDGMENTS.

See JUDGMENTS.

ORDERS.

See CONSTRUCTION OF ORDERS.

OUTSTANDING TERM.

See LANDLORD AND TENANT.

PARENT AND CHILD.

The Court has no jurisdiction to com-
pel a father, living in adultery, of
the custody of his child, unless he
brings the child in contact with the
woman with whom he is so living ;
nor to order him to permit the mo-
ther to have access to the child,
unless misconduct on his part is
shown, with reference to the ma-
nagement and education of the
child. [*Ball v. Ball*] - - - 35

PARTIES.

1. A bill will lie by the last indorsee
of a lost bill of exchange to recover
the amount from the acceptor,
and prior indorsees need not be
made parties to the suit. [*Macart-
ney v. Graham*] - - - - 285
2. Some of the shareholders in a
joint-stock company may file a bill
to have their deposits repaid, with-
out making all the other share-
holders parties if they are ignorant
of their names. [*Blain v. Agar*] 289
3. Some of the members of a part-
nership cannot file a bill, on behalf
of themselves and the others, for
a dissolution of the partnership :
but all the members, however nu-
merous, must be parties to the
suit. [*Long v. Yonge*] - - 369

4. To a bill by a vicar for some of the tithes of certain lands in the parish, no persons except the occupiers ought to be made parties, although the defendants allege that the tithes in question have been always received or demanded by the rector, and state that it is uncertain whether their lands are or not within the parish. [*Cook v. Blunt*] - - - - - 417
 5. The mortgagor is a necessary party to a bill by a second mortgagee to redeem the first mortgage, and foreclose the equity of redemption. [*Farmerv. Curtis*] - - - 466
 6. A second mortgagee may file a bill of foreclosure against the mortgagor and third mortgagee, without making the first mortgagee a party. [*Rose v. Page*] - - 471
- See JUDGMENT CREDITOR.—PLEA AND PLEADING, 10, 11, 12.

PARTNERSHIP.

See JOINT STOCK COMPANY.

PAYMENT OF MONEY INTO COURT.

Monies directed by settlement to be laid out in Government or real securities, were lent, by the trustees, to the husband, on bond; the trustees were ordered, on motion, to pay the sums into Court. [*Collis v. Collis*] - - - - - 365

See SEQUESTRATION.

PENALTIES.

If a defendant pleads that giving the discovery sought by the bill will subject him to penalties, but be-

tween the filing and the hearing of the plea, the time for suing for the penalties expires, the plea will be over-ruled. [*The Corporation of Trinity House v. Burge*] - 411

See PLEA AND PLEADING, 3.

PLAINTIFF.

See PRACTICE, 8.

PLEA AND PLEADING.

1. If a defendant pleads that giving the discovery sought by the bill will subject him to penalties, but between the filing and the hearing of the plea, the time for suing for the penalties expires, the plea will be over-ruled. [*The Corporation of Trinity House v. Burge*] - 411
2. To a bill praying a re-conveyance of four estates, the defendant put in a plea of a fine as to one; concluding with a disclaimer as to the others. The plea was over-ruled. [*Watkins v. Stone*] - - - - 49
3. Where a bill charges a defendant with acts which would subject him to a criminal prosecution under a statute, the defendant need not plead the statute, but may demur to the bill. [*Fleming v. St. John*] 181
4. To prevent a demurrer to a bill, it was falsely alleged in it that a revolted Colony of Spain had been recognized by Great Britain as an independent State: the Court is bound to know, judicially, that the allegation is false, and not to give it the intended effect. [*Taylor v. Barclay*] - - - - - 213
5. An executor filed a bill before

- probate: Plea that he had not proved the will allowed. [*Simons v. Milman*] - - - - 241
6. Defendant, in her answer to a bill for tithes of a mill, said that it was an ancient mill, built before living memory; that no tithes had ever been paid for it, and that it had always been considered exempt from tithes. Held, that the exemption was well pleaded. [*Townley v. Colegate*] - - 297
7. Some of the members of a partnership cannot file a bill, on behalf of themselves and the others, for a dissolution of the partnership; but all the members, however numerous, must be parties to the suit. [*Long v. Yonge*] - - - - 369
8. The Statute of Limitations, notwithstanding it is a defence at law, may be pleaded to a bill of discovery in aid of an action brought, provided it has been pleaded to the declaration. [*Macgregor v. The East India Company*] - 452
9. If the action was commenced before the bill was filed, the plea must aver that the cause of action did not accrue within six years before the action was brought. *Ibid.*
10. The mortgagor is a necessary party to a bill by a second mortgagee to redeem the first mortgage, and foreclose the equity of redemption. [*Farmer v. Curtis*] - 466
11. A second mortgagee may file a bill of foreclosure against the mortgagor and third mortgagee, without making the first mortgagee a party. [*Rose v. Page*] - - 471
12. An Act of Parliament for forming a joint-stock company authorized all suits, on behalf of the company, against any person to be commenced in the name of the chairman; and in all proceedings in which it would have been before necessary to state the names of the partners, it was made sufficient to state the name of the chairman only. Held, that the Act did not authorize suits, to be commenced by the chairman against one of the partners, without making the others parties. [*Macmahon v. Upton*] 473

See JUDGMENT CREDITOR—MULTIFARIOUSNESS.—PARTIES.—REVIVOR.—STATUTE OF LIMITATIONS, 2.—TITHES, 5.

POLICY OF ASSURANCE.

The assignment of a policy of assurance on a life, does not take it out of the order and disposition of the assignor, if no notice of the assignment is given to the insurers. [*Williams v. Thorp*] 257. See page 570.

POSSESSION, DELIVERY OF.

See PRACTICE, 13.

POST OBIT.

Where a tenant in tail in remainder had agreed to pay a sum of money after the death and failure of issue of his brother, the tenant in tail in possession, and had secured the money by a mortgage of the estate, and covenanted to levy a fine and suffer a recovery to give effect

to the mortgage, but on coming into possession of the estate refused to perform his covenant, the Court appointed a receiver of the rents. [*Free v. Hinde*] - - - - 7

POWER.

1. Power to appoint, amongst testator's present or future grandchildren or their respective issue, does not authorize the donee to exclude the children of a deceased grandchild, who were living at the donee's death. [*Garthwaite v. Robinson*] - - - - - 43
 2. A testator, in designating the objects of a power of appointment given to his daughter, used the words "issue," and "child or children," synonymously. In a subsequent part of his will, he gave his son a power of appointment over a different part of his property, and in pointing out the objects of it, used the word "issue" simply. The son had both children and grandchildren living at his death. Held, that an exercise of the power in favour of the former only was void. [*Dalzell v. Welch*] - 319
- See CONSTRUCTION, 9—TRUST.

PRACTICE.

1. Motion for leave to amend, without prejudice to a *Ne exeat*, refused. [*Grant v. Grant*] - 14
2. If the messenger ordered to bring up a defendant, dies, the serjeant-at arms will be ordered to go. [*Macnab v. Mensal*] - - - 16
3. Where a defendant, after notice of the plaintiff's intention to issue an

attachment unless an order for time is obtained, procures the order, but is unable, on account of the press of business, to get it drawn up, and omits to give the defendant notice of the order until an attachment is sealed, he can not set aside the attachment. [*Kirkpatrick v. Meers*] - - 16

4. An order for liberty to amend, and that plaintiff may answer amendments and exceptions at the same time, obtained before the filing of the report allowing the exceptions, is irregular. [*Rushon v. Troughton*] - - - - 33
5. Motion by a plaintiff for an injunction to restrain an action brought by one defendant against a co-defendant, granted. [*Kingham v. Maisey*] - - - - 41
6. A party, who omits to cross-examine a witness under a commission at the usual period, will be allowed to exhibit interrogatories for that purpose on a subsequent day. [*Carter v. Draper*] - - - 52
7. A plaintiff who had obtained the common injunction, as of course, procured an order to amend, and then obtained an injunction upon the amended bill by a motion of course. Held, that a special application ought to have been made. [*Home v. Watson*] - - - - 85
8. If a defendant, who has been taken on an attachment, still refuses to answer, the plaintiff may, at the same time, proceed to enforce an answer by the process of this Court, and bring an action

- against him and his sureties on the bond given to the sheriff under the attachment. [*Beddall v. Page*] 224
9. Two witnesses having been examined by the plaintiff to prove the defendant's hand-writing, said, that they did not believe it to be his hand-writing. Leave was given to the plaintiff to examine fresh witnesses to the same point. [*Greenwood v. Parsons*] - - - 229
10. Monies directed by a settlement to be laid out in Government or real securities, were lent, by the trustees, to the husband, on bond: the trustees were ordered, on motion, to pay the sums into Court. [*Collis v. Collis*] - - - 365
11. Three defendants were ordered to deliver up possession of estates to the receiver within a certain time, or to stand committed; but no writ of execution of the order was served on them. The defendants having refused to obey the order, the serjeant-at-arms was ordered to go against them. On the defendants being brought up in custody, it appeared that one of them was an infant, and he and another of them expressing contrition, were ordered to be discharged on payment of costs; the third, persisting in his contempt, was committed. The two others remained in custody, being unable to pay their costs. A motion, afterwards made by the defendants, to discharge the orders of commitment, for irregularity, was granted. [*Green v. Green*] - - - 394
12. Leave given to file a general demurrer after the second order for time had been taken out, the subpœna having been made returnable immediately, and there having been no wilful delay on the part of the defendants. [*The Attorney-General v. The Mayor and Corporation of Carlisle*] - - - 427
13. Course of proceeding to be followed to compel a defendant to deliver possession of estates to a receiver. [*Green v. Green*] 430
14. The thirteenth order does not apply to a case in which the answer was filed before the first day of Easter Term 1828. [*Harris v. Harrison*] - - - 431
15. Amendment of a bill, without serving a subpœna to answer the amendments, will not prevent the defendant from dismissing the bill. [*Bramston v. Carter*] - - 458
16. A motion to dismiss a bill to perpetuate testimony, for want of prosecution, is irregular. The proper application is, that the plaintiff may proceed within a given time, or may pay the defendant his costs. [*Wright v. Tatham*] - - - 459
17. On the 28th of November, plaintiffs filed a replication, and, on the 29th, a subpœna to rejoin, returnable immediately, tested on the 27th, but without obtaining an order for such subpœna; afterwards the defendants obtained an order to dismiss. Held, that the subpœna was irregular, and a motion to discharge the order of dis-

- missal was refused. [*Brown v. Moore*] - - - - - 464
18. To prevent a suit from being revived, either a plea or demurrer must be put into a bill of revivor: an answer, insisting that the plaintiff has no right to revive, is not sufficient. [*Lewis v. Bridgman*] 465
19. Leave given to amend a bill, without prejudice to an injunction obtained on filing the bill. [*Pickering v. Hanson*] - - - - - 488
20. If, between the giving of notice of motion to dismiss, and the making of the motion, plaintiff obtains an order to amend, the plaintiff must pay the costs of motion; but no order will be made upon it. [*Davenport v. Manners*] 514
21. The common injunction is not dissolved by the plaintiff obtaining an order to amend without saving the injunction, unless the record is altered. [*Davis v. Davis*] 515
22. Although there are two suits in this Court between parties having the same respective interests, and relating to the same matters, the depositions of such only of the witnesses in the prior suit, as are dead, will be allowed to be read in the subsequent suit. [*Carrington v. Cornock*] - - - - - 567
- See CONSOLIDATION OF SUITS.—
NEW TRIAL.—SEQUESTRATION.
WITNESSES, EXAMINATION OF.
- PRINCIPAL AND SURETY.
1. A surety in a bond is not discharged by the creditor taking from the debtor a *cognovit* in an action he had brought against the debtor, with a stay of execution until a day earlier than that on which judgment could have been obtained in the regular course. [*Hulme v. Coles*] - - - - - 12
2. A surety for part of a debt is not entitled to the benefit of a security given by the debtor to the creditor, at a different time, for another part of the debt. [*Wade v. Coope*] 155
3. A., on taking B. as a clerk, took a bond from A., and a surety, to secure his duly accounting for his receipts; no time was fixed for the continuance of the service, but it was to be determinable at the option of either party. The surety died. His executrix gave notice to A. that she should no longer consider herself liable on the bond. A. read the notice to B., and required him to execute a new bond, with another surety, which was done. Then B. died, and deficiencies were found in his accounts, subsequent to the notice. An injunction obtained, as of course, by the executrix, to restrain an action on the bond, was dissolved on the answer. [*Gordon v. Calvert*] - - - - - 253
- See 4 Russ. 581.
- PRIORITY OF INCUMBRANCES.
- Where, by the custom of a manor, no time is limited for presenting surrenders of copyholds, an incumbrancer, whose security has not been enrolled until long after

a subsequent incumbrance, will not be postponed, although the subsequent incumbrancer had no notice of the prior charge. [*Horlock v. Priestly*] - - - 75

PROCESS.

If the messenger, ordered to bring up a defendant, dies, the serjeant-at-arms will be ordered to go. [*Macnab v. Mensal*] - - - 16

See PRACTICE, 11, 13.

PRODUCTION OF DOCUMENTS.

A plaintiff in a tithe-suit is not entitled to a production of receipts for moduses and compositions, given to the defendants by the plaintiff and his predecessors, some of those receipts relating to tithes not sued for, and the other being evidence for the defendant, and not for the plaintiff. [*Tomlinson v. Lymer*] - - - 489

PROMISSORY NOTE.

Courts of equity have a concurrent jurisdiction with Courts of law in relieving against promissory notes taken when over-due. [*Hodgson v. Murray*] - - - 515

PUBLIC POLICY.

1. An agreement between two sons, to divide equally whatever property they may receive from their father in his life-time, or become entitled to under his will, or by descent or otherwise, from him, is not contrary to public policy, but will be enforced in equity. [*Wethered v. Wethered*] - - - 183

2. An agreement between two persons, having expectations from a third, to divide equally whatever he might leave them is valid. [*Harwood v. Tooke*] - - - 192

3. A revolted colony of Spain, not recognized as an independent state by Great Britain, executed bonds, at six per cent. interest, as securities for a loan. P., acting in collusion with B., a holder of the bonds in England, by falsely representing that he had purchased some of them, induced the plaintiff to become a purchaser: Held, on demurrer, that the bonds were not usurious, as it did not appear, by the bill, that the contract for the loan was made, or the amount of it to be paid in this country; that P. and B. would have been answerable to the plaintiff for losses sustained upon his purchase, but that, as the original contract was made with a government not acknowledged by Great Britain, the Court could not relieve him. [*Thompson v. Powles*] - - 194

4. To prevent a demurrer to a bill, it was falsely alleged in it, that a revolted colony of Spain had been recognized by Great Britain as an independent state; the Court is bound to know, judicially, that the allegation is false, and not to give it the intended effect. [*Taylor v. Barclay*] - - - 213

5. The salary of the assistant Parliamentary counsel to the Treasury is not assignable; and the Court

will not appoint a receiver of it.
[*Cooper v. Reilly*] - - - 560

RECEIVER.

Where a tenant in-tail in remainder had agreed to pay a sum of money, after the death and failure of issue of his brother, the tenant in tail in possession, and had secured the money by a mortgage of the estate, and covenanted to levy a fine and suffer a recovery to give effect to the mortgage, but, on coming into possession of the estate, refused to perform his covenant, the Court appointed a receiver of the rents. [*Free v. Hinde*] - - - 7
See APPROPRIATION.—PRACTICE, 13.—PUBLIC POLICY, 5.

RECTOR.

See PARTIES, 4.

RESIDUE.

See TENANT FOR LIFE OF
RESIDUE.

RESTRAINT ON ALIEN- ATION.

See ALIENATION.

RESTS.

See ACCOUNT.

REVERSION.

See INTEREST.

REVIVOR.

To prevent a suit from being revived, either a plea or demurrer must be put into the bill of revivor; an answer, insisting that the plaintiff has no right to revive, is not sufficient.
[*Lewis v. Bridgman*] - - - 465

REVOLTED COLONY.

See PUBLIC POLICY, 3, 4.

SALARY.

The salary of assistant Parliamentary counsel to the Treasury, is not assignable, and the Court will not appoint a receiver of it. [*Cooper v. Reilly*] - - - - - 560

SCOTCH WILL.

See DOMICIL.

SEQUESTRATION.

The Court has no jurisdiction to order, upon motion, a person, not a party in the cause, to pay into Court the arrears of an annuity, granted by him to a defendant, against whom a sequestration has issued for want of a sufficient answer, unless the grantor has, by his conduct, waved the objection to the jurisdiction, but he may, notwithstanding, (without applying for the leave of the Court) obtain from the grantee a release of the annuity. [*Johnson v. Chippindall*]

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SERJEANT AT ARMS.

See PRACTICE, 2. 11.

SET OFF.

See INJUNCTION, 3.—SPECIFIC
PERFORMANCE.

SOLICITOR

The Court will not exercise its summary jurisdiction to compel a vendor's solicitor to perform an undertaking, given by him at the sale, to do certain acts for clearing

the title to the estate. [*Peart v. Bushell*] - - - - - 38

See Costs, 1, 2.

SPECIFIC PERFORMANCE.

One of the terms of an agreement was, that the contract should be void if the purchaser's counsel should be of opinion that a marketable could not be made by a certain time. The counsel being of that opinion, a bill by the purchaser for a specific performance, with a compensation, was dismissed with costs; and an application afterwards made by the plaintiff, that his deposit might be set off against the defendant's costs, and the surplus (if any) paid to him, was refused with costs. [*Williams v. Edwards*] - - - - - 78

See AGREEMENT.—COMPENSATION.

NOTICE.—VENDOR AND PURCHASER, 6.

SPECIALTY DEBT.

By deed between A. and B. it was agreed that a sum in the hands of of A., but belonging to B., should be laid out in the funds, in A.'s name, in trust for B.; A. died, never having invested the money: Held, that B. was a specialty creditor of A. for the amount. [*Mavor v. Davenport*] - - 227

STATUTE OF LIMITATIONS.

1. The statute of limitations, notwithstanding it is a defence at law, may be pleaded to a bill of discovery in aid of an action brought, provided it has been pleaded to the

declaration. If the action was commenced before the bill was filed, the plea must aver that the cause of the action did not accrue within six years before the action was brought. [*Mac Gregor v. The East India Company*] - - 452

2. A plea of the statute of limitations need not deny the usual allegation that the defendants have books, &c. in their custody, unless it is alleged that those books, &c. would show that a promise had been made within six years. [*Ibid*] - - 454

STATUTE 54, G. 3, C. 168.

See WILL, 15.

SUBPENA.

See ATTACHMENT, 2.—DISMISSAL OF BILL, 1, 2.

SUPPLEMENTAL ANSWER.

Defendant, in her answer to a bill for tithes, pleaded a modus for all tithes. She then discovered that the modus covered part only of the tithes, and moved to correct the mistake by filing a supplemental answer: Ordered, that the cause should proceed as if the modus had been laid in the manner proposed. [*Podmore v. Skipwith*] 565

SUPPLEMENTAL BILL.

The defendant, in his answer to a bill filed by the assignees of a bankrupt, alleged that the plaintiffs had not obtained the necessary consent to the institution of the suit; upon which the plaintiffs filed a supplemental bill, stating, that since the

filing of the original bill, they had obtained the necessary consent: Demurrer to the supplemental bill allowed. [*King v. Tullock*] - 469
See p. 570.

SURETY.

See PRINCIPAL AND SURETY.

TENANT BY THE CURTESY.

Devise to A. and her heirs; but if she died leaving issue, then to such issue and their heirs. A. died leaving issue: Held, that her husband was not entitled to be tenant by the curtesy. [*Barker v. Barker*]

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TENANT FOR LIFE.

Devise to trustees, in trust to sell, for payment of debts, and subject thereto, to A. for life, *sans* waste, remainder to his first and other sons in tail. The trustee sold timber on the estate, and applied the proceeds in payment of the debts: Held, that A. was entitled to have the amount raised by sale of the estates, and paid to him. [*Davies v. Wescomb*] - - - - - 425
See LANDLORD AND TENANT.

TENANT FOR LIFE, AND REMAINDERMAN.

Devise to trustees and their heirs during the life of A. in trust for A., and after his decease to B. in fee. The trustees recover in A.'s life-time, damages for breach of covenants in a lease granted by the testatrix, and still subsisting. A. dies. The damages belong to her estate. [*Noble v. Cass*] - - 343

TENANT FOR LIFE OF RESIDUE.

The tenant for life of a residue, which is directed to be laid out in certain securities, is entitled to the income accrued in the first year after the testator's decease, on such parts of the testator's estate as are invested, at his death, in the proper securities, and on such parts as are afterwards so invested within the same year; but the income, before such investment, forms part of the capital of the residue. [*La Terriere v. Bulmer*] - - - 18

TENANT IN TAIL.

See RECEIVER.

TERM (*Outstanding*).

See LANDLORD AND TENANT.

TERRIER.

A terrier is evidence as to personal tithes. [*Townley v. Colegate*] 297

TESTIMONY.

See BILL TO PERPETUATE TESTIMONY.—DEPOSITIONS.—EVIDENCE.

THIRTEENTH ORDER.

See AMENDMENT, 2.

TIMBER.

See TENANT FOR LIFE.

TITHES.

1. Defendant, in her answer to a bill for tithes of a mill, said that it was an ancient mill, built before living memory; that no tithes had ever been paid for it; and that it had always been considered exempt from tithes; Held, that the exemption was well pleaded.

2. A miller who grinds his own corn, and sells the flour, is not liable to tithes for such mill.
3. A terrier is evidence as to personal tithes. Issue directed on the application of a vicar, to try the right to tithes. [*Townley v. Colgate*] 297
4. A miller who only grinds his own corn and sells the flour, is not liable to tithes for his mill. [*Browne v. Woolsey*] - - - - - 305
5. To a bill by a vicar for some of the tithes of certain lands in the parish, no persons except the occupiers ought to be made parties, although the defendants allege that the tithes in question have been always received or demanded by the rector, and state that it is uncertain whether their lands are or not within the parish. [*Cook v. Blunt*] - - - - - 417
6. Defendant, in her answer to a bill for tithes, pleaded a modus for all tithes. She then discovered that the modus covered part only of the tithes, and moved to correct the mistake by filing a supplemental answer: Ordered, that the cause should proceed as if the modus had been laid in the manner proposed. [*Podmore v. Skipwith*] - - 565

See DEPOSITIONS.—ISSUE.—PRODUCTION OF DOCUMENTS.

TITLE.

Old judgments existing against a former owner, of leaseholds, who parted with the property in 1770, and to enforce which, no steps appeared to have been taken, are

no objection to the title. [*Causton v. Macklew*] - - - - - 242

See SOLICITOR, 1.

TRUST.

A trust for sale vested in A. and his heirs, cannot be executed by an assign of A. [*Bradford v. Belfield*] 264

TRUSTEE.

A trustee of a charity-estate, who used the balances of the rents in carrying on his trade, will be charged with interest, at five per cent, but not with annual rests. [*Attorney General v. Solly*] - 518

See CONVERSION.—INFANT TRUSTEE.—PAYMENT OF MONEY INTO COURT.

UNCERTAINTY.

See WILL, 15.

USURY.

A revolted Colony of Spain, not recognized as an independant state by Great Britain, executed bonds at six per cent interest as securities for a loan. P., acting in collusion with B., a holder of the bonds in England, by falsely representing that he had purchased some of them, induced the plaintiff to become a purchaser. Held, on demurrer, that the bonds were not usurious, as it did not appear by the bill that the contract for the loan was made, or the amount of it to be paid in this country; that P. & B. would have been answerable to the plaintiff for losses sustained upon his purchase, but that,

as the original contract was made with a Government not acknowledged by *Great Britain*, the Court could not relieve him. [*Thompson v. Powles*] - - - - - 194

VENDOR AND PURCHASER.

1. One of the terms of an agreement was, that the contract should be void if the purchaser's counsel should be of opinion that a marketable title could not be made by a certain time. The counsel being of that opinion, a bill, by the purchaser, for a specific performance, with a compensation, was dismissed with costs. And an application, afterwards made by the plaintiff, that his deposit might be set off against the defendant's costs, and the surplus (if any) paid to him, was refused with costs. [*Williams v. Edwards*] - - 78
2. A revolted Colony of Spain, not recognized as an Independent State by *Great Britain*, executed bonds at six per cent interest as securities for a loan. P., acting in collusion with B., a holder of the bonds in *England*, by falsely representing that he had purchased some of them, induced the plaintiff to become a purchaser. Held, on demurrer, that the bonds were not usurious, as it did not appear, by the bill, that the contract for the loan was made, or the amount of it to be paid in this country; that P. and B. would have been answerable to the plaintiff for losses sustained upon his purchase; but that, as the original contract was made with a Government not acknowledged by *Great Britain*, the Court could not relieve him. [*Thompson v. Powles*] - - 194
3. Old judgments existing against a former owner of leaseholds, who parted with the property in 1770, and to enforce which no steps appeared to have been taken, are no objection to the title. *Causton v. Macklew*] - - - - - 242
4. A purchaser of a reversion ordered to pay interest on his purchase-money from the time of the purchase. [*Trefusis v. Lord Clinton*] 359
5. An estate consisting of fen-land, and so described in the particulars of sale, was charged by a local but public Act of Parliament, with drainage and embanking taxes, of which the purchaser had no express notice. Held, that he was not entitled to a compensation for those taxes. [*Barraud v. Archer*] 433
6. A copyholder covenants to surrender to trustees in trust to sell, and dies before surrender, leaving an infant heir; the covenantees agree to sell the estate, and afterwards file a bill for a specific performance. Held, that the heir is not an infant trustee within 6 G. 4, c. 74; and therefore cannot be ordered to surrender immediately, and consequently that the bill must be dismissed with costs. [*King v. Turner*] - - - - - 549

See JURISDICTION, 2.

VESTING OF PORTIONS.

Testator gave to his widow a life-interest in a fund, with a power of appointment, amongst all his children as should be living at her death; and in default of appointment, directed the fund to be divided amongst all *such* children, with a gift over to the widow, in case all the children died before their shares became payable. The widow appointed the fund to the two surviving children; one of them died in her life-time. Held that the only surviving child took, upon the widow's death, the whole of the fund. [*Bielefield v. Record*]

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See WILL, 3.

VICAR.

See ISSUE.

WIDOW.

See CHOSE IN ACTION, 2, 3.

WILL.

1. The tenant for life of a residue, which is directed to be laid out in certain securities, is entitled to the income accrued in the first year after the testator's decease, on such parts of the testator's estates as are invested, at his death, in the proper securities, and on such parts as are afterwards so invested within the same year; but the income, before such investment, forms part of the capital of the residue. [*La Terriere v. Bulmer*] - - - - - 18
2. Testator gave a copyhold estate to trustees for his wife, until the

leases to which it was subject expired, and directed that then it should be sold, and the proceeds be invested for the benefit of his children; but if his wife should die before the leases expired, that it should be immediately sold, and the proceeds disposed of as before. The wife survived the children, but died before the leases expired. The surviving trustee, who claimed the estate for his own benefit, was decreed to surrender it to the administrator of the children, but without prejudice to the rights of the customary heirs of the testator, or children, if any such heirs were in existence. [*Burton v. Hodsoll*] - - - - - 24

3. Testator directed his executors to purchase, out of his residuary estate, a certain sum of stock, and to pay the dividends to his wife for her life, and after her death to divide the capital between such of his three daughters as should be then living. Provided, that if any one of them should be then dead, or should afterwards die before her share should become payable or divisible, leaving a child or children, that share should go to such child or children. The testator's wife died in his life-time; one of the daughters died three months after the testator. Held, nevertheless, that she had a vested interest in one of the shares. [*Collins Macpherson*] - - - - - 87
4. Devise to A. for life, and to her heirs the issue of her body for

ever, for their lives; and in case A. has no son, then to her eldest daughter; followed by a proviso, containing a devise over if A. left no issue, or they should become extinct, creates an estate-tail in A. [*Reece v. Steel*] - - - - 233

5. By Mr. and Mrs. P's marriage settlement, estates in Kent and other counties, the lady's property, were settled on her for life, remainder to Mr. P. for life, if she should so appoint, remainder to their children, remainder as Mrs. P., by deed, under her hand and seal, *attested*, &c., or by her will, signed and published in the presence of three witnesses, should appoint; remainder to Mrs. P. in fee, with a power of sale, and directions for re-investing the proceeds in other estates, and in the usual securities in the interim; and that, *upon the re-investment*, the uses of the settlement should cease as to the sold estates. Mrs. P., by deed not attested as to her signature, (at the foot of which she had written, without date, directions for her burial), appointed the estates, after her decease, to her husband for life, and, in default of children, to him in fee; and she revoked a prior deed of appointment. The estates were afterwards sold, and the proceeds invested in securities, but were never re-invested in lands, although their liability to be so was recognized by the parties. There was no issue of the marriage.

Mrs. P. survived her husband, and applied part of the proceeds to her own use. At her death she was seised (exclusive of the settled property) of a mansion-house, with out-buildings, gardens, and a small field adjoining it, and some cottages opposite to it, let to tenants, and was possessed of some personal estate, no part of which was in the name of a trustee. She devised the mansion-house, with its appurtenances, and *all other her real estates*, to C. S., and bequeathed all her personal estate whether in the name of herself or of any trustee, subject expressly to her debts and legacies to other persons; after her death the deed of appointment was found in her house, with the title-deeds of the mansion-house; but the revoked deed could not be found. Her debts and legacies greatly exceeded her assets. Held, that the former deed was not a testamentary instrument, and that Mrs. P.'s receiving part of the proceeds of the settled estates, was not an entry or claim within 54 Geo. 3, c. 168; but that that statute remedied the defect of attestation; that the remaining proceeds remained as real estate, but did not pass either to the devisee or the residuary legatees; that Mr. P.'s co-heirs in gavelkind were not entitled to any part, but that the whole belonged to his heir at law under the appointment. [*Hougham v. Sandys*] - - - - - 95

6. Devise to A. and her heirs ; but if she died leaving issue, then to such issue and their heirs. A. died leaving issue. Held, that her husband was not entitled to be tenant by the curtesy. [*Barker v. Barker*] - - - - - 249
7. Testator gave to his heir one shilling, and devised to W. B. all his lands ; and in the next sentence, gave to him all his goods, chattels, personal and testamentary estate. Held, that the fee simple of the lands past to W. B. [*Bradford v. Belfield*] - - - - - 264
8. Devise to A. B. C. &c. share and share alike, for their lives, remainder to their respective children for their lives, and so to be continued from issue to issue for life ; but if any of them die leaving no issue, their shares to go to the survivors for their lives, and the issue of such of them as shall be dead, and in default of issue then over. Held, that A. B. C. take estates-tail, with cross-remainders. [*Mortimer v. West*] - - - - - 274
9. A testator, in designating the objects of a power of appointment given to his daughter, used the words, " issue " and " child or children " synonymously. In a subsequent part of his will he gave his son a power of appointment over a different part of his property, and in pointing out the objects used the word " issue " simply. The son had both children and grandchildren living at his death. Held, that an exercise of the power in favour of the former only was void. [*Dalsell v. Welch*] - 319
10. Testator gave to his widow a life-interest in a fund, with a power of appointment, amongst all his children living at her death ; and, in default of appointment, directed the fund to be divided amongst all such children, with a gift over to the widow, in case all the children died before their shares became payable. The widow appointed the fund to the two surviving children ; one of them died in her life-time. Held that the only surviving child took, upon the widow's death, the whole of the fund. [*Bielefield v. Record*] - - 354
11. Bequest of 40 l. per annum to A. for life, and after her decease, to B. or his heirs : Held, that " or " must be construed disjunctively ; and that therefore B. did not take an absolute interest in the annuity. [*Girdlestone v. Doe*] - - - 225
12. J. B., at his death, had a balance due from his banker, and was also entitled to a share of the balance due to A. B. from his banker, A. B. having received monies for him from time to time, and, with his knowledge, paid them to his own banker, as his own money ; but J. B. had no concern with those bankers, nor did they know that he was interested in the monies paid by A. B. J. B. bequeaths all his money in the hands of any banker : Held, that his balance at his own banker's, and also his share of A. B.'s balance, will pass ; and that

- evidence is admissible to show that he so intended. [*Benson v. Whitlam*] - - - - - 493
13. Testator gave to his daughter and her children 5,000 *l.*, 3,000 *l.* to be paid in one year after his decease, and 2,000 *l.* after the decease of his wife, and appointed A. B. trustee of those sums for his daughter and her children. The Court declared the 5,000 *l.* to be in trust for the daughter for life, and after her decease for all her children, whether born in the testator's life-time or after his decease. [*Morse v. Morse*] - - - 485
14. Bequest to H. D. for his own use, and in case he should die in the testator's life-time, or afterwards, without having any child or children, then over. H. D. survived the testator, and died without having had a child: Held, that the gift over took effect. [*Stone v. Maule*] - - - - - 490
15. A testator, who had long resided

in India gave a legacy "to T. P., who resided at A. when I left England, or to his heirs, executors, administrators or assigns." T. P. died in the testator's life-time: Held, that the bequest over was void for uncertainty. [*Waite v. Templer*] - - - - - 524

See CONSTRUCTION.—COPYHOLD.—DOMICIL.—LEGACY, 1, 2.—TENANT BY THE CURTESY.

WITNESSES (EXAMINATION OF.)

In support of a charge brought in under the decree, two witnesses examined by the plaintiff to prove the defendant's hand-writing, said that they did not believe it to be his hand-writing: Leave was given to the plaintiff to examine fresh witnesses to the same point. [*Greenwood v. Parsons*] - - - - 229

See CROSS-EXAMINATION OF WITNESSES.—DEPOSITIONS.

END OF THE SECOND VOLUME.



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